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CASES  
ON  
CRIMINAL LAW

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## PREFACE.

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This book of cases is prepared with the idea of assisting the student in his study of the substantive law of crimes. It is thought, however, that the topical arrangement made, with an illustrative case under each topic, may occasionally give the practitioner a leader over some troublesome path of investigation.

Annotations have not been indulged in by the editor. These are left to the individual instructor, who should, in our judgment, be given the largest freedom in selecting and presenting cases similar to those under consideration. No two men teach the same way, and he does best who teaches well in his own way and through his personality impresses upon the student the true value of each idea. No ironclad method in legal education can bring any good to anybody.

In preparing this work we are very much indebted to John W. Dwyer. He has revised the manuscript and made many important suggestions, and has taken the full responsibility of sending the work through the press. Without his patient labors this volume could not have been submitted.

JEROME C. KNOWLTON.

University of Michigan, November 1, 1902.



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# CASES ON CRIMINAL LAW

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## CHAPTER I.

### DEFINITION AND GENERAL NATURE OF CRIME.

#### 1. CRIME DEFINED.

*State v. O'Brien, 32 N. J. L. 169. (1867).*

DALRIMPLE, J.:

On the fifteenth day of November, 1865, the defendant was a switch-tender, in the employ of the New Jersey Railroad and Transportation Company. His duty was to adjust, and keep adjusted, the switches of the road at a certain point in the city of Newark, so that passenger trains running over the road would continue on the main track thereof, and pass thence to the city of Elizabeth. He failed to perform such duty, whereby a passenger train of cars, drawn by a locomotive engine, was unavoidably diverted from the main track to a side track, and thence thrown upon the ground. The cars were thrown upon each other with great force and violence, by means whereof one Henry Gardner, a passenger upon the train, was so injured that he died. The defendant was indicted for manslaughter, and convicted upon trial in the Essex Oyer and Terminer. He insisted, and in different forms, asked the court to charge the jury, that he could not legally be convicted, unless his will concurred in his omission of duty; the court refused so to charge. A rule to show cause why the verdict should not be set aside was granted, and the case certified into this court for its advisory opinion, as to whether there was any error in the charge of the court below, or in the refusal to charge, as requested.

The indictment was for the crime of manslaughter. If the defendant's omission of duty was wilful, or in other words, if his will concurred in his negligence, he was guilty of murder. Intent to take life, either by an act of omission or commission, distinguishes murder from manslaughter. In order to make out against the defendant the lesser offence of manslaughter, it was not necessary that it should appear that the act of omission was wilful or of purpose. The court was right in its refusal to charge as requested.

The only other question is, whether there is error in the charge delivered. The error complained of is, that the jury were instructed that a mere act of omission might be so criminal or culpable as to be the subject of an indictment for manslaughter. Such, we believe, is the prevailing current of authority. Professor Greenleaf, in the third volume of his work on evidence, § 129, in treating of homicide, says: "It may be laid down, that where one, by his negligence, has contributed to the death of another, he is responsible. The caution which the law requires in all these cases, is not the utmost degree which can possibly be used, but such reasonable care as is used in the like cases, and has been found, by long experience, to answer the end." Wharton, in his *Treatise on Criminal Law*, p. 382, says "There are many cases in which death is the result of an occurrence, in itself unexpected, but which arose from negligence or inattention. How far in such cases the agent of such misfortune is to be held responsible, depends upon the inquiry, whether he was guilty of gross negligence at the time. Inferences of guilt are not to be drawn from remote causes, and the degree of caution requisite to bring the case within the limits of misadventure, must be proportioned to the probability of danger attending the act immediately conducive to the death." The propositions so well stated by the eminent writers referred to, we believe to be entirely sound, and are applicable to the case before us. The charge, in the respect complained of, was in accordance with them. It expressly states, that it was a question of fact for the jury to settle, whether the defendant was or was not guilty of negligence; whether his conduct evinced under the circumstances such care and diligence as were proportionate to the danger to life impending. The very definition of crime is an act omitted or committed in violation of public law. The defendant in this case omitted his duty under such circumstances as amounted to gross or culpable or criminal negligence. The court charged the jury,



that if the defendant, at the time of the accident, was intending to do his duty, but in a moment of forgetfulness omitted something which any one of reasonable care would be likely to omit, he was not guilty. The verdict of guilty finds the question of fact involved in this proposition against the defendant, and convicts him of gross negligence. He owed a personal duty not only to his employers, but to the public. He was found to have been grossly negligent in the performance of that duty, whereby human life was sacrificed. His conviction was right, and the court below should be so advised.

---

## 2. DISTINCTION BETWEEN TORTS AND CRIMES.

*Commonwealth v. Warren, 6 Mass. 72. (1809.)*

An indictment found by the grand jury, at the last April term at *Ipswich*, against the defendant, states, that he, being an evil-disposed person, and contriving and intending one *Benjamin Adams* to deceive, cheat, and defraud, falsely pretended and affirmed to the said *Adams*, that his, the defendant's, name was *William Waterman*; that he lived in *Salem*, and there kept a grocery store; that he wished to purchase, on credit of *Adams*, fifty pair of shoes, giving his own note as security therefor; that *Adams*, giving credit to his false pretences and affirmations, sold him the shoes, and took, as security, the note of the defendant, subscribed by him with the name of *William Waterman*.

Upon conviction, the defendant moved in arrest of judgment, on the ground that the facts charged in the indictment, and of which he had been found guilty, are a private injury only, and do not amount to a public offence.

*Story*, in support of the motion, cited 2 *East's P. C.* 819.

PARSONS, C. J.:

At common law it is an indictable offence to cheat any man of his money, goods, or chattels, by using false weights or false measures; and by the English statute of 33 H. 8, c. 1, passed before the settlement of this country, and considered here as a part

of our common law, cheating by false tokens is made an indictable offence. The object of the law is, to protect persons who in their dealings use due diligence and precaution, and not persons who suffer through their own credulity, carelessness, or negligence. But as prudent persons may be overreached by means of false weights, measures, or tokens, or by a conspiracy, where two or more persons confederate to cheat, frauds effected in either of these ways are punishable by indictment. And by an English statute of 30 G. 2, c. 24, which is not in force in this state, the same prosecution has been extended to cheating by false pretences.

But if a man will give credit to the false affirmation of another, and thereby suffer himself to be cheated, he may pursue a civil remedy for the injury, but he cannot prosecute by indictment. (1)

If, therefore, *Adams* was cheated out of his shoes by the defendant, without using false weights, measures, or tokens, and by no conspiracy, but only by his credulity in believing the lies of the defendant, although he may have an action against the defendant to recover his damages, yet this indictment cannot be maintained, whatever false pretences the defendant may have wickedly used.

And it appears that *Adams* was imposed on by the gross lies of the defendant. He pretended and affirmed that his name was *William Waterman*, and that he was a grocer in good credit in *Salem*. *Adams*, unfortunately believing him, sold and delivered him the shoes on credit; and when the defendant gave his note as security, he used his false name.

We see here no conspiracy, for the defendant was alone in the fraud; and no false tokens to induce a credit; and as for false weights or measures, there is no pretence. We cannot therefore consider the facts stated in the indictment (however injurious they were to *Adams*) as constituting a public indictable offence. (2)

*Judgment arrested.*

*Bidwell*, attorney-general, for the commonwealth.

(1) Vide *Hawk. P. C. b. 1, c. 71, § 2.*—*Rex vs. Wheatly*, 2 Burr. 1125.

(2) *Rex vs. Lara*, 6 D. & E. 565.

*Henderson v. Commonwealth, 8 Grat. (Va.) 708. (1852.)*

At the April term 1850 of the Circuit court of Wood county, the grand jury found an indictment against George W. Henderson, for that he did break and enter the close of one Enos Pugh, situate in the county aforesaid, and at the house of said Enos Pugh did then and there wickedly, mischievously and maliciously, and to the terror and dismay of one Nancy Pugh, wife of said Enos Pugh, fire a gun in the porch of said house, and then and there did shoot and kill a dog belonging to said house, without any legal authority, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the Commonwealth. On the trial the jury found the defendant guilty, and assessed his fine at one hundred dollars: whereupon he moved the Court for a new trial, which motion was overruled; and he excepted.

The facts proved upon the trial were as follows: That some time about the 1st of March, 1850, in the county of Wood the defendant came to the house of Enos Pugh about eight or nine o'clock in the morning, and then and there went upon the porch of the dwelling house, having his gun on his shoulder and his shot-pouch about his neck: A part of the family of Enos Pugh was then in the house. The defendant told Nancy Pugh, wife of Enos, that he suspected her dogs for worrying and killing his sheep, and he had come to kill the said dogs. She told him that she did not believe the said dogs were guilty, and refused to have them killed, and forbade his doing so; but he disregarding what she said, took his gun from his shoulder, still standing on the porch, and shot and killed one of the dogs; and then and there loaded his gun and shot another of said dogs and wounded him; the said dogs then lying in the yard near the said porch: One of the dogs being a large one and the other a small one, the large one being killed. That the smoke of the gun when fired passed into the dwelling house by the door. Nancy Pugh was much alarmed by the firing of the gun in the manner in which it was done; and two of her daughters, members of the family, were also greatly alarmed, and one of them who was dyspeptic, so much

so that she became sick in consequence of it, and had to call in medical assistance. At the time the above transaction took place there was none of the male portion of said Pugh's family at home; they being confined in the jail of Wood county, having been convicted upon accusations made against them by the defendant.

The other facts proved related to the question whether the dogs shot by the defendant were the same that had worried his sheep. They were not seen by any one to do it; or to be near the place where it was done; and the facts relied upon to shew their guilt were certainly not very conclusive against them; but it is not a question of much importance in this case.

After the Court had overruled the motion for a new trial the defendant filed errors in arrest of judgment.

1st. That the facts stated in the indictment did not constitute a penal offence under any statute in force at the time the act was done.

2d. That they did not constitute an offence at common law.

But the Court overruled the motion to arrest the judgment; and rendered a judgment upon the verdict for the Commonwealth. Whereupon the defendant applied to this Court for a writ of error, which was allowed.

LOMAX, J., delivered the opinion of the Court:

It is abundantly clear that the mere breaking and entering the close of another, though in contemplation of law a trespass committed *vi et armis*, is only a civil injury to be redressed by action; and cannot be treated as a misdemeanor to be vindicated by indictment or public prosecution. But when it is attended by circumstances constituting a breach of the peace, such as entering the dwelling house with offensive weapons, in a manner to cause terror and alarm to the family and inmates of the house, the trespass is heightened into a public offence, and becomes the subject of a criminal prosecution. The case of *Rex v. Storr*, 3 Burr. R. 1698, and *Rex v. Bathurst*, which was cited in that case, establish and illustrate both of these principles. Three of the indictments in that case were quashed, because they amounted merely to trespass *vi et armis*. But as to the fourth indictment, which was for entering a dwelling house *vi et armis*, and with *strong hand*, the objection to that indictment was given up by the counsel for the defend-

ant, and the prosecution for that offence was sustained, whilst the three first indictments were ordered by the Court to be quashed. From what was said in those cases, the circumstance that the place where the entry is made is a dwelling house, as reason would suggest, and the peace of those abiding under the sanctity of their home and the security of their castle, would strongly require, is a most important circumstance to be taken into consideration in the aggravation of trespass *quare clausum fregit* into a misdemeanor; as is also the circumstance that the entry was made with fire arms or other offensive or dangerous weapons. The facts, as disclosed in this record for the purpose of sustaining the motion for a new trial, shew a trespass most aggravated in both of these circumstances; as also in the destruction of animals within the personal and domestic protection of the owners of the dwelling house, and the alarm and dismay and other evils which the violence occasioned to the unprotected females of the family. No trespass could be aggravated beyond the wrongs of a private injury and swell into the magnitude of a crime against the public peace, if the facts stated in the record do not amount to a misdemeanor. Therefore the motion for a new trial was properly overruled. It is hardly less clear, that the frame of the indictment, in its charges of the circumstances accompanying the trespass, is sufficient to maintain the prosecution. Wherefore the errors in arrest of judgment were also properly overruled. The judgment of the Circuit court should be affirmed.

---

### 3. SETTLEMENT BETWEEN THE WRONG-DOER AND THE PERSON INJURED.

*Fleener v. State, 58 Ark. 98. (1893.)*

BUNN, C. J.:

The defendant, A. W. Fleener, was indicted at the October term, 1892, of the St. Francis circuit court, for the crime of embezzlement; at the March term, 1893, found guilty, and sentenced to imprisonment in the penitentiary for the period of one year. Motions in arrest of judgment, and also for new trial, were overruled, and appeal taken to this court.

\* \* \* \* \*

The fourth ground of the motion for new trial is a novel one. The defendant contends that having hired the guaranty company

to make his bond for the faithful performance of duty to the Pacific Express Company, and that company having paid the express company for all losses claimed by it to have been suffered by reason of defendant's alleged embezzlement, therefore there was no crime committed; that the express company had no longer any interest at stake, and even that the state has no interest in the matter. In this the defendant is mistaken. This is no longer a controversy between himself and the two companies, or either of them, and has not been, since he fraudulently appropriated the money of the express company, if, indeed, he did so appropriate it. It is now a controversy between the state of Arkansas and himself, which the state will not permit either one of the said companies to determine, at present or in the future, nor will the state acknowledge the validity of any settlement of it, by anything they both, or either of them, have done in the past.

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#### 4. CONSENT OF PERSON INJURED.

*State v. Burnham, 56 Vt. 445. (1884.)*

Indictment for a breach of the peace. Trial by jury, December term, 1883, Taft J., presiding. Verdict guilty. The evidence for the prosecution tended to show that the respondent and one Bloxham engaged in a boxing match; that it was agreed upon three or four days in advance; that notice of it was given among the people; that one of the parties had a second and that a referee to superintend the encounter was chosen; that the Queensberry rules were to govern the contestants; that a crowd of from twenty-five to one hundred people were collected upon the fair grounds near the village, a ring made, and from four to six rounds were fought, during which the respondent and said Bloxham were engaged in assaulting and beating each other; that blood flowed from a wound on one of the parties, which the respondent's testimony tended to show resulted from hitting an old wound on his head; that bruises made in the melee remained visible on the face of one of them the second succeeding day; that the thumb of one of them was sprained, and one of them knocked down. The respondent's evidence tended to show that he went down to avoid the blows of his adversary. The other facts are stated in the opinion.

The opinion of the court was delivered by:

Ross, J.:

We have to consider this case as presented by the exceptions. It is true, as contended by the respondent's counsel, that sparring or boxing with gloves manufactured for that purpose, as conducted and engaged in in ordinary athletic sports, is not unlawful, nor a breach of the peace. It may be that such sports, properly conducted, are both healthful and promotive of physical vigor and development, and should be encouraged. But such pugilistic exercise may be abused and carried beyond the limits of healthful and lawful exercise and sport. It may be so conducted as to create a breach of the peace. It may even degenerate into a prize fight. Many of the circumstances detailed in the exceptions, the agreement to engage in the match, giving notice, having seconds, a referee, rules, a ring, etc., are not inconsistent with lawful sport, nor yet with a breach of the peace. Neither is the fact that slight injuries were inflicted upon the contestants determinative of the character of the engagement. The court told the jury that if they found the facts, which the evidence tended to show, proven, they would be warranted in returning a verdict of guilty, although the combatants fought by consent. The court instructed the jury what would constitute a breach of the peace in a manner satisfactory to the respondent. He excepted to the charge on the subject of consent. The court did not withdraw from the jury the determination of whether what the evidence tended to show, would constitute a breach of the peace. It left that whole subject to the determination of the jury, with proper instructions on the subject of what would constitute a breach of the peace. The only question reserved was whether the consent of the combatants would prevent their acts from being a breach of the peace. Clearly, such consent would not necessarily give character to their acts and prevent their becoming a breach of the peace. The conduct—quarreling, challenging, assaulting, tumultuous and offensive carriage, etc., which the statute declares to be a breach of the peace—is capable of being consented to by all the parties guilty of it. Consent, therefore, was not at all determinative of whether the respondent and Bloxham were guilty of a breach of the peace by their acts and conduct on the occasion complained of. The court were correct in instructing the jury that their consent to engage in such acts and conduct was not determinative of the quality of the same in

regard to guilt or innocence. Their acts and conduct might have all the elements of a breach of the peace notwithstanding such consent.

Neither was the respondent entitled to have admitted the offered evidence to show that such matches were common and harmless amusements, innocent and proper exercises, practiced in the universities and colleges in this country. Such evidence was not at all determinative of, nor helpful in determining, the character and quality of the contest between the respondent and Bloxham, as conducted by them on the occasion complained of.

Nor was there error in not giving the huge boxing gloves to the jury to examine. Probably, if it had allowed the jury to make such examination, it would not have been error. Whether it would or would not order such examination was largely in the discretion of the county court. The gloves furnished no criterion by which to judge of the character of the contest, nor of the manner in which it was conducted.

The result is that no error is found in the action of the county court. If the jury, under proper instructions, have given a wrong character to the contest and conduct of the respondent, relief must be sought in some other manner than upon exceptions to correct rulings of the county court. The result is, that judgment is rendered that no error is found in the proceedings of the county court, that the exceptions are overruled, and judgment rendered on the verdict.

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#### 5. ENTRAPMENT INTO CRIME.

*State v. Hull, 33 Oreg. 56. (1898.)*

To constitute the crime of larceny, as charged in the indictment, there must be a trespass, that is, a taking of the property without the consent of the owner. It is therefore evident that the crime is not committed when the taking is by the consent, however morally guilty the taker may be. This is elementary law. But the difficulty lies in determining when the taking is by the consent of the owner in cases where he lays a plan to entrap a suspected thief. Upon this subject Mr. Bishop says: "The cases of greatest difficulty are those in which one, suspecting crime in another, lays a plan to entrap him. Consequently, even if there



is a consent, it is not within the knowledge of him who does the act. Here we see, from principles already discussed, that, supposing the consent really to exist, and the case be one in which, on general doctrines, the consent will take away the criminal quality of the act, there is no legal crime committed, though the doer of the act did not know of the existence of the circumstance which prevented the criminal quality from attaching. But exposing property, or neglecting to watch it, under expectation that a thief will take this property, or furnishing any other facilities or temptations to such or any other wrongdoer, is not a consent in law": 1 Bish. Cr. Law (5th ed.), § 262. And in *Williams v. State*, 55 Ga. 395, Mr. Justice BLECKLEY, in his usual clear and lucid style, puts the law thus: "It seems to be settled law that traps may be set to catch the guilty, and the business of trapping has, with the sanction of courts, been carried pretty far. Opportunity to commit crime may, by design, be rendered the most complete; and, if the accused embrace it, he will still be criminal. Property may be left exposed for the express purpose that a suspected thief may commit himself by stealing it. The owner is not bound to take any measures for security. He may repose upon the law alone, and the law will not inquire into his motive for trusting it. But can the owner directly, through his agent, solicit the suspected party to come forward and commit the criminal act, and then complain of it as a crime, especially where the agent to whom he has intrusted the conduct of the transaction puts his own hand into the *corpus delicti*, and assists the accused to perform one or more of the acts necessary to constitute the offense? Should not the owner and his agent, after making everything ready and easy, wait passively, and let the would-be criminal perpetrate the offense for himself in each and every essential part of it? It would seem to us that this is the safer law, as well as the sounder morality, and we think it accords with the authorities: 2 Leach, 913; 2 East, P. C. c. 16, § 101, p. 666; 1 Car. & M. 218; *Dodge v. Brittain*, Meigs, 86; *Kemp v. State*, 11 Hump. 320; *State v. Corington*, 2 Bail. 569. It is difficult to see how a man may solicit another to commit a crime upon his property, and, when the act to which he was invited has been done, be heard to say that he did not consent to it." And, again, in *Love v. People*, 160 Ill. 508, (43 N. E. 713), Mr. Justice PHILLIPS says: "It is safer law and sounder morals to

hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it, for himself, but they must not aid, encourage or solicit him that they may seek to punish."

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#### 6. NEGLIGENCE OR WRONG OF THE PERSON INJURED.

*Regina v. Swindall et al., 2 Car. & K. 230. (1846.)*

The prisoners were indicted for the manslaughter of one James Durose. The second count of the indictment charged the prisoners with inciting each other to drive their carts and horses at a furious and dangerous rate along a public road, and with driving their carts and horses over the deceased at such furious and dangerous rate, and thereby killing him. The third count charged Swindall with driving his cart over the deceased, and Osborne with being present, aiding and assisting. The fourth count charged Osborne with driving his cart over the deceased, and Swindall with being present, aiding and assisting.

Upon the evidence, it appeared that the prisoners were each driving a cart and horse, on the evening of the 12th of August, 1845. The first time they were seen that evening was at Draycott toll gate, two miles and a half from the place where the deceased was run over. Swindall there paid the toll, not only for that night, but also for having passed with Osborne through the same gate a day or two before. They then appeared to be intoxicated. The next place at which they were seen was Tean bridge, over which they passed at a gallop, the one cart close behind the other. A person there told them to mind their driving: this was 990 yards from the place where the deceased was killed. The next place where they were seen was 47 yards beyond the place where the deceased was killed. The carts were then going at a quick trot, one closely following the other. At a turnpike gate a quarter of a mile from the place where the deceased was killed, Swindall, who appeared all along to have been driving the first cart, told the toll-gate keeper, "We have driven over an old

man"; and desired him to bring a light and look at the name on the cart; on which Osborne pushed on his cart, and told Swindall to hold his bother, and they then started off at a quick pace. They were subsequently seen at two other places, at one of which Swindall said he had sold his concern to Osborne. It appeared that the carts were loaded with pots from the potteries. The surgeon proved that the deceased had a mark upon his body which would correspond with the wheel of a cart, and also several other bruises, and, although he could not say that both carts had passed over his body, it was possible that both might have done so.

Mr. Greaves, in opening the case to the jury, had submitted that it was perfectly immaterial in point of law, whether one or both carts had passed over the deceased. The prisoners were in company, and had concurred in jointly driving furiously along the road; that that was an unlawful act, and, as both had joined in it, each was responsible for the consequences, though they might arise from the act of the other. It was clear that they were either partners, master and servant, or at all events companions. If they had been in the same cart, one holding the reins, the other the whip, it could not be doubted that they would be both liable for the consequences; and in effect the case was the same, for each was driving his own horse at a furious pace, and encouraging the other to do the like.

At the close of the evidence for the prosecution, Allen, Serjt., for the prisoners, submitted, that the evidence only proved that one of the prisoners had run over the deceased, and that the other was entitled to be acquitted.

POLLOCK, C. B.:

I think that that is not so. I think that Mr. Greaves is right in his law. If two persons are in this way inciting each other to do an unlawful act, and one of them runs over a man, whether he be the first or the last he is equally liable; the person who runs over the man would be a principal in the first degree, and the other a principal in the second degree.

Allen, Serjt.: The prosecutor, at all events, is bound to elect upon which count he will proceed.

POLLOCK, C. B.:

That is not so. I very well recollect that in *Reg. v. Goode* there were many modes of death specified, and that it was also alleged

that the deceased was killed by certain means to the jurors unknown. When there is no evidence applicable to a particular count, that count must be abandoned; but if there is evidence to support a count, it must be submitted to the jury. In this case the evidence goes to support all the counts.

Allen, Serjt., addressed the jury for the prisoners.

POLLOCK, C. B. (in summing up):

The prisoners are charged with contributing to the death of the deceased, by their negligence and improper conduct, and if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy against the other for damages. So, in order that one shipowner may recover against another for any damage done, he must be free from blame: he cannot recover from the other if he has contributed to his own injury, however slight the contribution may be. But, in the case of loss of life, the law takes a totally different view—the converse of that proposition is true; for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person. Generally, it may be laid down, that, where one by his negligence has contributed to the death of another, he is responsible; therefore, you are to say, by your verdict, whether you are of opinion that the deceased came to his death in consequence of the negligence of one or both of the prisoners. A distinction has been taken between the prisoners: it is said that the one who went first is responsible, but that the second is not. If it is necessary that both should have run over the deceased, the case is not without evidence that both did so. But it appears to me that the law, as stated by Mr. Greaves, is perfectly correct. Where two coaches, totally independent of each other, are proceeding in the ordinary way along a road, one after the other, and the driver of the first is guilty of negligence, the driver of the second, who had not the same means of pulling up, may not be responsible. But when two persons are driving together, encouraging each other to drive at

a dangerous pace, then, whether the injury is done by the one driving the first or the second carriage, I am of opinion that in point of law the other shares the guilt.

Verdict, guilty.

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*In re Cummins, 16 Colo. 451. (1891.)*

In June, 1891, petitioner was examined before a justice of the peace in and for Las Animas county under four separate and distinct charges of obtaining money under false pretenses. As a result of such examinations he was required in each case to give bond for his appearance at the next succeeding term of the district court to be held in Las Animas county to answer such charges, or, upon a failure so to do, to be committed to the common jail of the county to await the action of the grand jury. The petitioner failing to furnish bond, warrants of commitment were issued, upon which he was incarcerated in the county jail. Thereupon he made application to the Honorable J. C. Gunter, judge of the Third judicial district, to be discharged upon a writ of habeas corpus. After a full hearing upon such application the prisoner was remanded to custody. It appeared, however, from the complaint, as well as by the evidence, that the money which he had obtained by the alleged false pretenses was paid him in each instance by the prosecuting witnesses, respectively, in the furtherance of an illegal purpose to obtain by fraud valuable coal lands from the United States. The application is now renewed in this court.

HAYT, J.:

If two persons conspire together to accomplish an unlawful purpose, and one, by false pretenses, obtains money from the other, which the latter parts with in furtherance of the illegal purpose, will a prosecution lie against the former for obtaining the money under false pretenses? This is the substantial question presented upon the record. Counsel for petitioner contend that it will not, while the affirmative is assumed by the attorney general. The authorities bearing upon the question cannot be reconciled. In the leading cases of *Com. v. Henry*, 22 Pa. St. 253, and *McCord v. People*, 46 N. Y. 470, exactly opposite conclusions were reached upon facts that are quite similar. In the former case it was

alleged in the indictment that the defendant, intending to defraud the prosecutor, falsely asserted to him, and also to another person, who communicated it to him, that he had a legal warrant for the arrest of the daughter of the prosecutor for an offense punishable by a fine and imprisonment, and that he threatened to arrest her, by means of which representation he obtained from the prosecutor property of the value of \$100. The trial court having quashed the indictment, its judgment was reversed by the supreme court and the indictment declared sufficient. In the case of *McCord v. People*, *supra*, the indictment charged the defendant with having falsely and fraudulently represented that he had a warrant for one Miller, and that Miller, believing said false representations, was induced and did deliver to the defendant a gold watch and diamond ring. In this case it was held that, as the property had been voluntarily surrendered as an inducement to the officer to violate the law and disregard his official duties, the indictment could not be sustained; the court declaring that the statute against obtaining money by false pretenses was designed to protect only those who for an honest purpose are induced by false or fraudulent representation to give credit, or part with their property, and not to protect those who do this for an unworthy or illegal purpose. The opinion of the court in this case is quite brief, while Peckham, J., filed an able and exhaustive dissenting opinion. In support of the majority opinion two cases are cited by the court, viz., *People v. Williams*, 4 Hill, 9; *Same v. Stetson*, 4 Barb. 151. An examination of the former case shows it to be no authority upon the question presented here; the decision being simply to the effect that a false representation, to be within the statute, must be such as is calculated to mislead persons of ordinary prudence and caution,—a conclusion not generally accepted elsewhere. 2 Bish. Cr. Law, § 433. In *People v. Stetson*, *supra*, it seems, however, to have been determined that, if the owner in parting with his property, etc., was himself guilty of a crime, the indictment, under the statute, could not be sustained; and a similar conclusion was reached in *State v. Crowley*, 41 Wis. 271, in which case the information charged a conspiracy on the part of several defendants to defraud the prosecutor of his money, and, the proof showing that the conspiracy charged was in connection with an unlawful enterprise, in which the prosecutor and the defendants were *particeps criminis*, it was held that a conviction was not war-

ranted. It appeared, also, that, had the prosecutor exercised common prudence and caution, he could not have been misled by the false pretenses by which he was induced to part with his money. In opposition to this doctrine, and in line with the Pennsylvania decision, we find *Com. v. Morrill*, 8 Cush. 571. Mr. Bishop, reviewing the different conclusions, says: "Another doctrine sustained in New York is that where, if the false pretenses were true, the person parting with his goods would be guilty of a crime therein, or where he actually commits an offense in parting with them, the indictment for the cheat cannot be maintained. On the other hand, the Massachusetts court appears to have directly discarded this doctrine. The point decided was that a defendant cannot set up, in answer to an indictment of this nature, any wrongful representation of the person injured concerning the goods charged to have been obtained through the false pretense. 'Supposing,' said Dewey, J., 'it should appear that (the individual defrauded) had also violated the statute, that would not justify the defendants. If the other party had also subjected himself to a prosecution for a like offense, he also may be punished. This would be much better than that both should escape punishment because each deserved it equally.' And this view accords with the general spirit of the criminal law, wherein the fault of one man is not received in excuse for that of another; while the New York doctrine would introduce a well-known principle of civil jurisdiction into a system of laws to which it is alien." 2 Bish. Cr. Law, (7th Ed.) § 469. Finding this conflict in the authorities, we are left free to decide the question propounded solely upon principle. In our opinion, the conclusion reached by Mr. Bishop is supported by the better reasons. The primary object of punishment is the suppression of crime; and, where both the prosecutor and defendant have violated the law, it is better that both be punished than that the crime of one should be used to shield the other. When the plaintiff in a civil action is shown to have been guilty of a wrong in the particular matter about which he complains, he cannot ordinarily recover. But there is little chance to apply this rule to criminal prosecutions conducted by the state; the person defrauded being at most a prosecuting witness in the case, and not a party to the proceeding. The language of our statute is plain. The false pretenses charged in this case are embraced within its express terms, and we are not in

favor of sanctioning a rule that will permit offenders to escape by showing that another should also be punished. The petitioner's application to be discharged will therefore be denied, and the prisoner remanded.

Petition denied.

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## 7. CIVIL AND CRIMINAL PROCEEDINGS FOR THE SAME WRONG.

*Williams v. Dickenson, 28 Fla. 90. (1891.)*

TAYLOR, J.:

Edward T. C. Dickenson, the defendant in error, instituted his action of trespass in the Circuit Court of Jackson county; in the First Judicial Circuit, on the 23rd day of December, 1886, against Daniel W. Williams, the plaintiff in error. The declaration alleging that Dickenson was the owner and in possession of a certain frame building in Jackson county, to-wit: a gin house, together with the fixtures usually belonging to a building in which cotton is ginned by steam power, consisting of a water tank, one cotton-press, one steam engine, boiler and machinery, two cotton gins with feeders and condensers, two gin feeders and condensers, lots of cotton in the seed and lint, lots of cotton seed, bagging and ties, tools, belting, shafting and pulleys, etc. That the defendant Williams, on or about the 16th day of December, 1886, wilfully and maliciously contriving and intending to injure the plaintiff, counseled, hired, caused and obtained one Prior Wheeler to set on fire and burn the said building, fixtures, goods and chattels, and by reason of such counseling, hiring, causing and obtaining, the said Prior Wheeler, on the 16th day of December, 1886, did set on fire and burn the said gin house, fixtures, goods and chattels aforesaid, whereby they were burned up and totally consumed; and by said wrongful acts the plaintiff was greatly damaged by the loss and consuming of said property. And plaintiff was also greatly damaged by said wrongful acts, and by reason thereof, suffered much annoyance and inconvenience and trouble, pain of mind and body. Damages in the sum of \$10,000 was claimed. To this declaration the defendant pleaded the general issue, said plea being filed January 25th, 1887. On the 31st day of May, 1887, by leave of the court, the defendant also filed the following plea in abatement: "Now comes the defendant, and for a plea



in abatement to plaintiff's action says, that the cause of action set forth in plaintiff's declaration is a tort which amounts to a felony, and the defendant has been indicted therefor in the Circuit Court for Jackson county, and said indictment is still pending and no trial has been had thereof, wherefore defendant prays that said suit be abated." To this plea in abatement the plaintiff interposed a demurrer. This demurrer was sustained upon argument, and exception was taken. On the 28th day of September, 1887, after leave granted, the plaintiff filed an amendment to his declaration, whereby a second count was added to the original declaration, charging the defendant himself with the burning of said property. To this amended declaration the defendant pleaded also the general issue.

The first error assigned is the order sustaining the plaintiff's demurrer to the defendant's plea in abatement. This plea seeks to invoke the doctrine held in the English courts, that where a private individual has been damaged in person or property by the tortious act of another, which act amounts to a felony, the matter should be disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offense, before the injured individual can seek civil redress for the private wrong inflicted upon him. The redress of the private wrong being postponed until after the public justice is satisfied. Two reasons for this rule are assigned in England: First, the party injured is relied upon to take the place of public prosecutor; in some cases he has even been required to employ counsel to prosecute on behalf of the crown, and his interest in the accomplishment of public justice is kept alive by postponing the redress of his private grievance; and, second, in cases of felony, there was a forfeiture to the crown of the felon's property, and the private individual was not allowed to acquire priority over the crown in satisfaction of his demands upon the property of the felon. But in this country this doctrine of the suspension of the civil remedy in cases of felony has been repudiated by the great weight of the American authorities. Under the system of laws prevailing in the United States the reasons for this rule are entirely absent. Here we have a public officer whose duty it is to prosecute all offenders against the State without reliance upon the injured individual; and here we have no forfeiture of the felon's goods. The civil and the criminal prose-

cution may, therefore, go on *pari passu*; or the one may precede, or succeed the other; or, if the criminal prosecution is never commenced at all, the failure to seek public justice is no bar to the private remedy. Neither is an acquittal or conviction upon the criminal charge any bar to the civil action. Cooley on Torts, 86 *et seq.*; *Pettingill v. Rideout*, 6 N. H., 454; *Blassingame v. Graves*, 6 B. Mon., 38; *B. & W. R. R. Co. v. Dana*, 1 Gray, 83; *Hawk v. Minnick*, 19 Ohio St., 462; *Newell v. Cowan*, 30 Miss., 492. The court below properly sustained the demurrer to the defendant's plea in abatement.

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*Boston Ry. v. Dana*, 1 Gray (Mass.), 83. (1854.)

BIGELOW, J.:

The main objection, raised by the defendant in the present case, which, if well maintained, is fatal to the plaintiffs' action, presents an interesting and important question, hitherto undetermined by any authoritative judgment in the courts of this commonwealth.

The plaintiffs seek to recover in an action of assumpsit a large sum of money alleged by them to have been fraudulently abstracted from their ticket office by the defendant, while he was in their employment as depot-master, having charge of their principal railway station in Boston. In regard to this item of the plaintiffs' claim, the defendant contended at the trial, and requested the judge who presided to instruct the jury, that the plaintiffs were not entitled to recover in this action the money thus taken by the defendant, because their cause of action, if any they had, was suspended, until an indictment had been found or complaint made against the defendant for larceny. This request was refused, and the jury were instructed, that if the defendant had fraudulently taken and appropriated the plaintiffs' money in the manner alleged, and was thereby guilty of larceny, he would be liable in the present action, although no criminal prosecution had first been instituted therefor. It is upon the correctness of this instruction that the first and main question in the case arises.

The doctrine, that all civil remedies in favor of a party injured by a felony are, as it is said in the earlier authorities, merged in the higher offence against society and public justice, or, according to more recent cases, suspended until after the termination

of a criminal prosecution against the offender, is the well settled rule of law in England at this day, and seems to have had its origin there at a period long anterior to the settlement of this country by our English ancestors. *Markham v. Cob*, Latch, 144, and Noy, 82. *Dawkes v. Coveleigh*, Style, 346. *Cooper v. Witham*, 1 Sid. 375, and 1 Lev. 247. *Crosby v. Leng*, 12 East, 413. *White v. Spettigue*, 13 M. & W. 603. 1 Chit. Crim. Law, 5.

But although thus recognized and established as a rule of law in the parent country, it does not appear to have been, in the language of our constitution, "adopted, used and approved in the province, colony or state of Massachusetts Bay, and usually practiced on in the courts of law." The only recorded trace of its recognition in this commonwealth is found in a note to the case of *Higgins v. Butcher*, Yelv. (Amer. ed.), 90 *a*, note 2, by which it appears to have been adopted in a case at *nisi prius* by the late Chief Justice Sewall. The opinion of that learned judge, thus expressed, would certainly be entitled to very great weight, if it were not for the opinion of this court in *Boardman v. Gore*, 15 Mass. 338, in which it is strongly intimated, though not distinctly decided, that the rule had never been recognized in this state, and had no solid foundation, under our laws, in wisdom or sound policy. Under these circumstances, we feel at liberty to regard its adoption or rejection as an open question, to be determined, not so much by authority, as by a consideration of the origin of the rule, the reasons on which it is founded, and its adaptation to our system of jurisprudence.

The source, whence the doctrine took its rise in England, is well known. By the ancient common law, felony was punished by the death of the criminal, and the forfeiture of all his lands and goods to the crown. Inasmuch as an action at law against a person, whose body could not be taken in execution and whose property and effects belonged to the king, would be a useless and fruitless remedy, it was held to be merged in the public offence. Besides; no such remedy in favor of the citizen could be allowed without a direct interference with the royal prerogative. Therefore a party injured by a felony could originally obtain no recompense out of the estate of a felon, nor even the restitution of his own property, except after a conviction of the offender, by a proceeding called an appeal of felony, which was long disused, and wholly abolished by *St.* 59 Geo. 3, *c.* 46; or under *St.*

21, H. 8, c. 11, by which the judges were empowered to grant writs of restitution, if the felon was convicted on the evidence of the party injured or of others by his procurement. 2 Car. & P. 43, *note*. But these incidents of felony, if they ever existed in this state, were discontinued at a very early period in our colonial history. Forfeiture of lands or goods, on conviction of crime, was rarely, if ever, exacted here; and in many cases, deemed in England to be felonies and punishable with death, a much milder penalty was inflicted by our laws. Consequently the remedies, to which a party injured was entitled in cases of felony, were never introduced into our jurisprudence. No one has ever heard of an appeal of felony, or a writ of restitution under *St.* 21 H. 8, c. 11, in our courts. So far therefore as we know the origin of the rule and the reasons on which it was founded, it would seem very clear that it was never adopted here as part of our common law.

Without regard however to the causes which originated the doctrine, it has been urged with great force and by high authority, that the rule now rests on public policy; 12 East, 413, 414; that the interests of society require, in order to secure the effectual prosecutions of offenders by persons injured, that they should not be permitted to redress their private wrongs, until public justice has been first satisfied by the conviction of felons; that in this way a strong incentive is furnished to the individual to discharge a public duty, by bringing his private interest in aid of its performance, which would be wholly lost, if he were allowed to pursue his remedy before the prosecution and termination of a criminal proceeding. This argument is doubtless entitled to great weight in England, where the mode of prosecuting criminal offences is very different from that adopted with us. It is there the especial duty of every one, against whose person or property a crime has been committed, to trace out the offender, and prosecute him to conviction. In the discharge of this duty, he is often compelled to employ counsel; procure an indictment to be drawn and laid before the grand jury, with the evidence in its support; and if a bill is found, to see that the case on the part of the prosecution is properly conducted before the jury of trials. All this is to be done by the prosecutor at his own cost, unless the court, after the trial, shall deem reimbursement reasonable. 1 Chit. Crim. Law, 9, 825. The whole system of the administration

of criminal justice in England is thus made to depend very much upon the vigilance and efforts of private individuals. There is no public officer, appointed by law in each county, as in this commonwealth, to act in behalf of the government in such cases, and take charge of the prosecution, trial and conviction of offenders against the laws. It is quite obvious that, to render such a system efficacious, it is essential to use means to secure the aid and coöperation of those injured by the commission of crimes, which are not requisite with us. It is to this cause, that the rule in question, as well as many other legal enactments, designed to enforce upon individuals the duty of prosecuting offences, owes its existence in England. But it is hardly possible, under our laws, that any grave offence of the class designated as felonies can escape detection and punishment. The officers of the law, whose province it is to prosecute criminals, require no assistance from persons injured, other than that which a sense of duty, unaided by private interest, would naturally prompt.

On the other hand, in the absence of any reasons, founded on public policy, requiring the recognition of the rule, the expediency of its adoption may well be doubted. If a party is compelled to await the determination of a criminal prosecution before he is permitted to seek his private redress, he certainly has a strong motive to stifle the prosecution and compound with the felon. Nor can it contribute to the purity of the administration of justice, or tend to promote private morality, to suffer a party to set up and maintain in a court of law a defence founded solely upon his own criminal act. The right of every citizen, under our constitution, to obtain justice promptly and without delay, requires that no one should be delayed in obtaining a remedy for a private injury, except in a case of the plainest public necessity. There being no such necessity calling for the adoption of the rule under consideration, we are of opinion that it ought not to be engrafted into our jurisprudence.

We are strengthened in this conclusion by the weight of American authority, and by the fact that in some of the states, where the rule had been established by decisions of the courts, it has been abrogated by legislative enactments. *Pettingill v. Rideout*, 6 N. H. 454. *Cross v. Guthery*, 2 Root, 90. *Piscataqua Bank v. Turnley*, 1 Miles, 312. *Foster v. Commonwealth*, 8 W. & S. 77. *Patton v. Freeman*, Coxe, 113. *Hepburn's case*, 3 Bland. 114.

*Allison v. Farmers' Bank of Virginia*, 6 Rand, 223. *White v. Fort*, 3 Hawks, 251. *Robinson v. Culp*, 1 Const. Rep. 231. *Story v. Hammond*, 4 Ohio, 376. *Ballew v. Alexander*, 6 Humph., 433. *Blossingame v. Graves*, 6 B. Monr., 38. Rev. Sts. of N. Y. Part. 3, c. 4, § 2. St. of Maine of 1844, c. 102.

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#### 8. THE ACT OR OMISSION MUST BE DECLARED A CRIME BY LAW.

*Commonwealth v. Marshall et al.*, 11 Pick. (Mass.), 350. (1831.)

At April term 1831 of this Court, in the county of Franklin, the defendants were indicted for a misdemeanor in disinterring a dead body on the 20th of February of the same year, *contra formam statuti*. The defendants pleaded *nolo contendere*, and afterwards moved in arrest of judgment, for the following reasons, 1. because the offence charged in the indictment is therein stated to have been committed in violation of the statute passed March 2, 1815, (*St.* 1814, c. 175,) which was repealed by the statute of February 28, 1831, (*St.* 1830, c. 57,) (1) without any saving or excepting clause whatever; and 2. because no offence, now known by the laws of this commonwealth, is therein described.

SHAW, C. J., delivered the opinion of the Court:

This indictment cannot be maintained, consistently with the decision of the Court, last year, in the case in this county, of *Commonwealth v. Cooley*, 10 Pick. 37. In that case it was held, that the statute of 1814 containing a series of provisions in relation to the whole subject matter of the disinterment of dead bodies, had superseded and, by necessary implication, repealed the provisions of the common law on the same subject. If it be true, as contended, that as a general rule the repeal of a repealing law, revives the preëxisting law, it would be difficult to maintain that such a clause of repeal, in a statute containing a series of provisions, revising the whole subject, and superseding the existing statute, would revive the preëxisting provisions of the common law.

(1) Rev. Stat., c. 130, § 19.

But were that point conceded, as contended for, it would not aid this indictment.

In the case supposed, the common law would not be in force during the existence of the statute, and if revived by its repeal, such revival would take effect only from the time of such repeal.

It is clear, that there can be no legal conviction for an offence, unless the act be contrary to law at the time it is committed; nor can there be a judgment, unless the law is in force at the time of the indictment and judgment. If the law ceases to operate by its own limitation or by a repeal, at any time before judgment, no judgment can be given. Hence, it is usual in every repealing law, to make it operate prospectively only, and to insert a saving clause, preventing the operation of the repeal, and continuing the repealed law in force, as to all pending prosecutions, and often as to all violations of the existing law already committed.

These principles settle the present case. By the statute 1830, *c.* 57, § 6, that of 1814 was repealed without any saving clause. The act charged upon the defendants as an offence, was done, after the passing of the statute of 1814, and before that of 1830. The act cannot be punished as an offence at common law, for that was not in force during the existence of the statute; nor by the statute of 1814, because it has been repealed without any saving clause; nor by the statute of 1830, for the act was done before that statute was passed. No judgment therefore can be rendered against the defendants, on this indictment. (2) *Judgment arrested.*

(2) See *Commonwealth v. Kimball*, 21 Pick. 373; *Commonwealth v. Mott*, *ibid.* 492; *Miller's case*, 3 Wils. 420; *Anon.* 1 Wash. C. C. R. 84; *Rex v. M'Kenzie*, Russ. & Ry. C. C. 429; *Stocver v. Immell*, 1 Watts, 258; *Commonwealth v. King*, 1 Wharton, 460; *Butler v. Palmer*, 1 Hill's (N. Y.) R. 324.

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## 9. THE FEDERAL GOVERNMENT HAS NO COMMON LAW CRIMINAL JURISDICTION.

*United States v. Hudson*, 7 Cranch (U. S.), 32. (1812.)

The Court, having taken time to consider, the following opinion was delivered (on the last day of the term, all the judges being present) by JOHNSON, J.:

The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases. We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those Courts by statute.

Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition.

The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions—that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer.

It is not necessary to inquire whether the general Government, in any and what extent, possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those Courts as a consequence of their creation.

And such is the opinion of the majority of this Court: For, the power which Congress possess to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects; and when a Court is created, and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction—much more extended—in its nature very indefinite—applicable to a great



variety of subjects varying in every state in the Union—and with regard to which there exists no definite criterion of distribution between the District and Circuit Courts of the same district?

The only ground on which it has ever been contended that this jurisdiction could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it. But, without examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited Government; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it which is here contended for. If it may communicate certain implied powers to the general Government, it would not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt—imprison for contumacy—inforce the observance of order, &c., are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.

## 10. ACTS MALA IN SE AND ACTS MALA PROHIBITA.

*Commonwealth v. Adams, 114 Mass. 323. (1873.)*

COMPLAINT for assault and battery.

At the trial in the Superior Court, before *Bacon, J.*, it appeared that the defendant was driving in a sleigh down Beacon Street, and was approaching the intersection of Charles Street, when a team occupied the crossing. The defendant endeavored to pass the team while driving at a rate prohibited by an ordinance of the city of Boston. In so doing, he ran against and knocked down a boy who was crossing Beacon Street. No special intent on the part of the defendant to injure the boy was shown. The defendant had pleaded guilty to a complaint for fast driving, in violation of the city ordinance. The Commonwealth asked for a verdict, upon the ground that the intent to violate the city ordinance supplied the intent necessary to sustain the charge of assault and battery. The court so ruled, and thereupon the defendant submitted to a verdict of guilty, and the judge, at the defendant's request, reported the case for the determination of this court.

ENDICOTT, J.:

We are of opinion that the ruling in this case cannot be sustained. It is true that one in the pursuit of an unlawful act may sometimes be punished for another act done without design and by mistake, if the act done was one for which he could have been punished if done wilfully. But the act, to be unlawful in this sense, must be an act bad in itself, and done with an evil intent; and the law has always made this distinction, that if the act the party was doing was merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune or mistake; but if *malum in se*, it is otherwise. 1 Hale P. C. 39. Foster C. L. 259. Acts *mala in se* include, in addition to felonies, all breaches of public order, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done

wilfully or corruptly. Acts *mala prohibita* include any matter forbidden or commanded by statute, but not otherwise wrong. 3 Greenl. Ev., § 1. It is within the last class that the city ordinance of Boston falls, prohibiting driving more than six miles an hour in the streets.

Besides, to prove the violation of such an ordinance, it is not necessary to show that it was done wilfully or corruptly. The ordinance declares a certain thing to be illegal; it therefore becomes illegal to do it, without a wrong motive charged or necessary to be proved; and the court is bound to administer the penalty, although there is an entire want of design. *The King v. Sainsbury*, 4 T. R. 451, 457. It was held in *Commonwealth v. Worcester*, 3 Pick. 462, that proof only of the fact that the party was driving faster than the ordinance allowed was sufficient for conviction. See *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Waite*, 11 Allen, 264. It is therefore immaterial whether a party violates the ordinance wilfully or not. The offence consists, not in the intent with which the act is done, but in doing the act prohibited, but not otherwise wrong. It is obvious, therefore, that the violation of the ordinance does not in itself supply the intent to do another act which requires a criminal intent to be proved. The learned judge erred in ruling that the intent to violate the ordinance in itself supplied the intent to sustain the charge of assault and battery. The verdict must therefore be set aside, and a *New trial granted.*

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#### 11. REPENTANCE AND WITHDRAWAL FROM THE ACT.

*State v. Allen*, 47 Conn. 121. (1879.)

The motion for a new trial shows, that upon the trial it was claimed by the State that the accused and one Henry Hamlin, both of whom were lawfully confined in the State prison, conspired to escape from such confinement, and to use all means which might become necessary to effect such escape, even to the taking of the life of any one who might oppose them, should it become necessary to do so in order to overcome such opposition; that in pursuance of such combination they provided themselves with two loaded revolver pistols, one a seven-shooter, and the other a four-shooter, and with

handcuffs and a gag, and on the evening of September 1st, 1877, escaped from their cells and secreted themselves in the hall of the prison, where they were discovered by Wells Shipman, an armed night-watchman of the prison, and that thereupon they both fired at Shipman, who was wounded by one of the shots, and died from such wound on the next day; and that after Shipman was wounded he ran towards the alarm bell, pursued by the accused and Hamlin, who overtook him, when he sank insensible upon the corridor, and was then handcuffed and gagged by them; that Allen then went to his cell about one hundred and fifty feet distant, leaving Hamlin with Shipman, where he was discovered and fired at by the guard of the prison, and that thereupon Hamlin went to the cell of Allen and that both then broke into the attic and were taken the next morning. The State claimed that Shipman was shot before he was handcuffed.

It was claimed by the defense that if there was any conspiracy between the accused and Hamlin it was merely to bribe an officer of the prison to permit them to escape, and that whatever was done after Shipman discovered the accused and Hamlin, was not in pursuance of any plan or conspiracy; and that immediately after Shipman was handcuffed and gagged Allen abandoned the enterprise and went to his cell, and that Shipman was afterwards shot by Hamlin alone.

It was admitted upon the trial that the bullet found in Shipman's body fitted the four-shooter and did not fit the seven-shooter, which was of smaller caliber. The defense claimed that the seven-shooter was the pistol carried by Allen and that it had not been discharged, and in support of this claim called as a witness an officer of the prison, who after testifying that he found the two pistols in the attic of the prison, upon information given him by Allen of the place where they were concealed, was inquired of, "Did Allen inform you as to the condition of the pistol before you found it?" This question, upon the objection of the State, was excluded, and we think properly so. The defense claims that the question is not within the operation of the rule that the accused cannot avail himself in evidence of his own declarations, because Allen's knowledge of the condition of the pistol (assuming that the question related to the seven-shooter), could not have been acquired unless it was the one which he carried, and that such knowledge is therefore a fact to which he was entitled. There would be some force in this claim if

the assumption of the defense as to Allen's means of knowledge was well founded, but it is not. We suppose that by "the condition of the pistol" is meant its condition as to being loaded or otherwise. While Allen and Hamlin were together after Shipman was shot and before they were taken the next morning, each had every opportunity to know the condition of the other's weapon, and would, naturally, have been informed as to it.

The objection of the defense to the two warrants of commitment under which Hamlin was imprisoned was properly overruled. The evidence was admissible and important, in connection with proof of the combination of Allen and Hamlin to escape, to characterize such combination as a conspiracy, by showing that they were lawfully imprisoned, and hence that the combination was for a criminal purpose, and the existence of the conspiracy being proved, to show that in its prosecution Hamlin, for whose acts Allen his co-conspirator was liable, was not striving to liberate himself from illegal imprisonment, but was criminally attempting to escape from lawful custody.

The court charged the jury as follows: "If the jury shall find that Hamlin and Allen, at some time previous to the homicide, made up their minds in concert to break the State prison and escape therefrom at all hazard, and knowing that the enterprise would be a dangerous one and expose them to be killed by the armed night watchman of the prison should they be discovered in making the attempt, wilfully, deliberately and premeditatedly determined to arm themselves with deadly weapons, and kill whatever watchman should oppose them in their attempt; and if the jury should further find that in pursuance of such design they armed themselves with loaded revolvers to carry their original purpose into execution, and while engaged in efforts to escape from the prison were discovered by the watchman Shipman, the deceased, and in the scuffle which ensued he was wilfully killed by Hamlin or Allen while they were acting in concert and in pursuance of their original purpose so to do in just such an emergency as they now found themselves in, then Hamlin and Allen are both guilty of murder in the first degree. And in the opinion of the court, Allen would be guilty of murder in the first degree, if, in the state of things just described, he in fact abandoned, just before the fatal shot was fired by Hamlin, all further attempt to escape from the prison, and the infliction of further violence upon

the person of Shipman, without informing Hamlin by word or deed that he had so done, and Hamlin, ignorant of the fact, shortly after fired the fatal shot in pursuance of and in accordance with the purpose of the parties down to the time of the abandonment."

We do not think that the objection made by the defense to this part of the charge is well founded. Under such circumstances Allen's so-called abandonment would be but an operation of the mind—a secret change of purpose. Doing nothing by word or deed to inform his co-conspirator of such change of purpose, the reasonable inference would be that he did not intend to inform him of it, and thus he would be intentionally encouraging and stimulating him to the commission of the homicide by his supposed co-operation with him. Such intent not to inform Hamlin of this change of purpose would, under the circumstances, be decisive of his guilt.

But the charge proceeds: "In other words, if during the fatal encounter with deadly weapons, in the state of things just described, Allen suddenly abandoned Hamlin, abandoned the enterprise and went to his cell, without saying a word to Hamlin to the effect that he had abandoned the enterprise, and Hamlin, supposing that he was still acting with him and that he had gone to his cell for an instrument to carry on the encounter, fired the fatal shot, his abandonment under such circumstances would be of no importance. A man cannot abandon another under such circumstances and escape the consequences of the aid he has rendered up to the time of the abandonment."

A majority of the court think that the jury may have been misled by this part of the charge, and that, therefore, especially in view of the grave issues involved in the case, a new trial should be granted.

If Allen did in fact before the homicide withdraw from the conspiracy, abandon the attempt to escape, and with the knowledge of Hamlin leave and go to his cell, Hamlin's misconstruction of his purpose in leaving did not necessarily make his conduct of no importance.

Until the fatal shot there was the "*locus penitentiae*." To avail himself of it Allen must indeed have informed Hamlin of his change of purpose, but such information might be by words or acts; and if with the intention of notifying Hamlin of his withdrawal from the conspiracy he did acts which should have

been effectual for that purpose, but which did not produce upon the mind of Hamlin the effect which he intended and which they naturally should have produced, such acts were proper for the jury to consider in determining the relation of Allen to the crime which was afterwards committed.

Allen's act of leaving and going to his cell, if he did so, had some significance in connection with the question of intention and notice, and was therefore proper for the consideration of the jury. How much weight was to be given to it would depend upon circumstances, such as the situation of the parties and the opportunity for verbal or other notice.

The same observations are perhaps applicable to the charge of the court in answer to the sixth request for instructions. While it is clear that the request as made should not have been complied with, the charge that was given may be open to the implication that some notice of Allen's abandonment of the conspiracy must have been given by him to Hamlin beyond that afforded by his act of leaving.

The answers of the court to the other requests for instructions seem to us, in view of the claims of the counsel and the admitted facts in the case, to be correct and sufficiently explicit.

A new trial is advised.

## CHAPTER II.

### CONDITIONS OF CRIMINALITY.

#### I. THERE MUST BE SUFFICIENT AGE.

*Angelo v. People, 96 Ill. 209. (1880.)*

Mr. JUSTICE WALKER delivered the opinion of the Court:

At the August term, 1878, of the Morgan circuit court, the grand jury presented an indictment against John Angelo, then about seventy-eight years of age, and his son, Theodore Angelo, about eleven years of age, for the murder of Isaac Hammill. A trial was had at the following November term of the court, resulting in the acquittal of John, on the ground of insanity, and the conviction of Theodore of manslaughter, and the jury fixed the term of his imprisonment in the penitentiary at six years. A motion for a new trial by Theodore was entered, but overruled by the court, and he was sentenced to the Reform School for four years; and he prosecutes error, and brings the record to this court, and urges a reversal, on several grounds.

The statute has provided, by section 282 of the Criminal Code, that a person shall be considered of sound mind who is neither an idiot nor lunatic, nor affected with insanity, and who has arrived at the age of fourteen, or before that age if such person knows the distinction between good and evil. The 283d section provides that an infant under ten years of age shall not be found guilty of any crime or misdemeanor.

In Great Britain the lowest possible period fixed by law at which an infant could be convicted for a crime, was seven, whilst our statute has fixed the period at ten years. In both countries fourteen is the period after which the law presumes capacity, without proof of knowledge of good and evil.

Blackstone, Vol. 4, p. 23, says: "Under seven years of age, indeed, an infant can not be guilty of felony; for then a felonious discretion is almost an impossibility in nature." He further says that convictions have been had of infants between seven and fourteen;—"But in all such cases the evidence of that malice which



is to supply age ought to be strong and clear beyond all doubt and contradiction.”

In Broom’s Legal Max., pp. 232-3, it is said: “With regard to persons of immature years, the rule is, that no infant within the age of seven years can be guilty of felony, or be punished for any capital offence; for, within that age, an infant is by presumption of law *doli incapax*, and can not be endowed with any discretion, and against this presumption no averment shall be received. This legal incapacity, however, ceases when the infant attains the age of fourteen years, after which period his acts become subject to the same rule of construction as those of any other person.”

“Between the ages of seven and fourteen years an infant is deemed *prima facie* to be *doli incapax*; but in this case the maxim applies, *malitia supplet aetatem*—malice (which is here used in its legal sense, and means the doing of a wrongful act intentionally, without just cause or excuse) supplies the want of mature years. Accordingly, at the age above mentioned, the ordinary legal presumption may be rebutted by strong and pregnant evidence of mischievous discretion; for the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent’s understanding and judgment. In all such cases, however, the evidence of malice ought to be strong, and clear beyond all doubt and contradiction.” See Archbold’s Crim. Plead. pp. 11 and 12, where the same rule is announced. Nor are we aware of any opposing authority.

There is uncontradicted evidence in the record that plaintiff in error was little more than eleven years of age when the homicide was committed. This evidence was not contradicted, but was virtually conceded by the eighth instruction asked and given for the People. If this was true, and the evidence tended to prove it, the rule required evidence strong and clear beyond all doubt and contradiction, that he was capable of discerning between good and evil; and the legal presumption being that he was incapable of committing the crime, for want of such knowledge, it devolved on the People to make the strong and clear proof of capacity, before they could be entitled to a conviction. This record may be searched in vain to find any such proof. There was no witness examined on that question, nor did any one refer to it. There is simply evidence as to his age. For aught that appears, he may

have been dull, weak, and wholly incapable of knowing good from evil. It does not appear, from even the circumstances in evidence, that he may not have been mentally weak for his age, or that he may not have even approached idiocy.

The law presumes that he lacked mental capacity at his age, and that presumption has not been overcome by the requisite proof, or, in fact, any proof. The court below should, therefore, have granted a new trial, and erred in refusing it.

Again, the jury were not clearly and fully instructed on this question. Several instructions given for the People omitted this rule, when they should have been qualified by informing the jury that proof, and clear proof, of capacity must be given. In such a case the mere announcement of the rule in general terms, as was done in the eighth of the People's instructions, was not sufficient. The jury may have been misled by the instructions that should have been qualified.

It is to be regretted that counsel who assisted the prosecuting attorney referred, as he did in his argument to the jury, to the fact that plaintiff in error was not placed on the stand as a witness, as one of the reasons why he should be convicted. It is true, that when stopped by the court, he said it was inadvertently done, and the jury were directed by the court to disregard that portion of his argument. Notwithstanding what he said, and the direction of the court to disregard it, who can know what effect it may have had on the jury in forming their verdict? Such comments are prohibited by the statute, and it is strange that any attorney should so far forget the rights of the accused, and his professional duty, for a moment, even in the heat of discussion; but he said it was inadvertent, and we are loth to believe that any attorney would intentionally act so unfairly and unprofessionally. We can not conceive that any member of the bar could deliberately seek by such means to wrongfully procure a conviction and the execution of a fellow being, when his highest professional duty to his client only requires him to see that there is a fair trial according to the law and the evidence. Where such things are done, whether intentionally or inadvertently, it may make an impression on the minds of the jury that nothing can remove. And who can say that this inadvertence may not have produced the verdict of guilty?

We think plaintiff in error has not had a fair trial and the

judgment of the court below must be reversed and the cause remanded.

*Judgment reversed.*

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## II. THE PERSON MUST HAVE ACTED VOLUNTARILY.

### *a. Coercion Presumed in Coverture.*

*Commonwealth v. Munsey*, 112 Mass. 287. (1873.)

With regard to the remaining exception, it has been decided that if a wife, in the absence of her husband, do a criminal act, even in obedience to his order, her coverture will be no defence. *Commonwealth v. Murphy*, 2 Gray, 510. *Commonwealth v. Fee-ney*, 13 Allen, 560. *Commonwealth v. Gannon*, 97 Mass. 547. In order to make out the defence that she was acting under the coercion or control of the husband, it must appear that he was present at the time. *Commonwealth v. Butler*, 1 Allen, 4. But in order to establish the fact of his presence, it does not seem to be necessary to show that the act was done literally in his sight. If the husband were near enough for the wife to be under his immediate influence and control, though not in the same room, it is sufficient. *Commonwealth v. Burk*, 11 Gray, 437. If he were on the premises and near at hand, a momentary absence from the room, or a momentary turning of his back, might still leave her under his influence. *Commonwealth v. Welch*, 97 Mass. 593. The instructions given to the jury may have led them to suppose that there could be no influence and control capable of exonerating the wife, unless the husband were literally present, and in sight of the wife.

*Exceptions sustained.*

*b. Persons Under Compulsion.**Arp v. State, 97 Ala. 5. (1893.)*

COLEMAN, J.:

At the July term, 1892, of the Circuit Court, the defendant was convicted of murder in the first degree, and sentenced to suffer death.

On this phase of the evidence the court was asked to give the following charge: "If the jury believe from the evidence that the defendant killed Pogue under duress, under compulsion from a necessity, under threats of immediate impending peril to his own life, such as to take away the free agency of the defendant, then he is not guilty." The court refused this charge, and the refusal is assigned as error. This brings up for consideration the question, what is the law when one person, under compulsion or fear of great bodily harm to himself, takes the life of an innocent person; and what is his duty when placed under such circumstances?

The fact that defendant had been in the employment of Burkhalter is no excuse. The command of a superior to an inferior, of a parent to a child, of a master to a servant, or of a principal to his agent, will not justify a criminal act done in pursuance of such command.—1 Bishop, § 355; *Reese v. State*, 73 Ala. 18; 4 Blackstone, § 27.

In a learned discussion of the question, to be found in *Leading Criminal Cases*, Vol. 1, p. 81, and note on p. 85, by Bennett & Heard, it is declared that "for certain crimes the wife is responsible although committed under the compulsion of her husband. Such are murder," etc. To the same effect is the text in 14 Am. & Eng. Encyc. of Law, p. 649; and this court gave sanction to this rule in *Bibb v. State*, 94 Ala. 31; 10 So. Rep. 506. In Ohio a contrary rule prevails in regard to the wife.—*Davis v. State*, 15 Ohio, 72; 45 Amer. Dec. 559. In Arkansas there is a statute specially exempting married women from liability, when "acting under the threats, commands or coercion of their husbands," but it was held

under this act there was no presumption in favor of the wife accused of murder, and that it was incumbent on her to show that the crime was done under the influence of such coercion, threats or commands.”—*Edwards v. State*, 27 Ark. 493, reported in 1 Criminal Law by Green, p. 741.

In the case of *Beal v. The State of Ga.*, 72 Ga. Rep. 200, and also in the case of *The People v. Miller*, 66 Cal. 468, the question arose upon the sufficiency of the testimony of a witness to authorize a conviction for a felony, it being contended that the witness was an accomplice. In both cases the witness was under fourteen years of age. It was held that if the witness acted under threats and compulsion, he was not an accomplice. The defendants were convicted in both cases.

In the case of *Rex v. Crutchly*, 5 C. & P. 133, the defendant was indicted for breaking a threshing machine. The defendant was allowed to prove that he was compelled by a mob to go with them and compelled to hammer the threshing machine, and was also permitted to prove that he ran away at the first opportunity.

In Hawkins’ Pleas of the Crown, Vol. 1, Ch. 28, Sec. 26, it is said: “The killing of an innocent person in defense of a man’s self is said to be justifiable in some special cases, as if two be shipwrecked together, and one of them get upon a plank to save himself, and the other also, having no other means to save his life, get upon the same plank, and finding it not able to support them both, thrusts the other from it, whereby he is drowned, it seems that he who thus preserved his own life at the expense of that other, may justify the fact by the inevitable necessity of the case.”

In 1 Hale’s Pleas of the Crown, Ch. VIII, § 50, it is said “There is to be observed a difference between the times of war, or public insurrection or rebellion, when a person is under so great a power, that he can not resist or avoid, the law in some cases allows an impunity for parties compelled, or drawn by fear of death to do some acts in themselves capital, which admit no excuse in time of peace. \* \* \* Now as to times of peace, if a man be menaced with death, unless he will commit an act of treason, murder or robbery, the fear of death doth not excuse him, if he commit the act; for the law hath provided a sufficient remedy against such fears by applying himself to the court and officers of justice for a writ or precept *de securitate pacis*. Again, if a man be desperately assaulted, and in peril of death, and can not

otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person, the present fear of actual force will not acquit him of the crime and punishment of murder, if he commit the act; for he ought rather to die himself than kill an innocent; but if he can not otherwise save his own life, the law permits him in his own defense to kill his assailant."

Blackstone, Vol. 4, § 30, declares the law to be, "Though a man be violently assaulted, and has not other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent."

In Stephen's Commentaries, Vol. 4, Book 6, Ch. 2, pp. 83-4, the same rule is declared to be the law.

In East's Crown Law, the same general principles are declared as to cases of treason and rebellion, etc. But on page 294, after referring to the case of two persons being shipwrecked and getting on the same plank, proceeds as follows: "Yet, according to Lord Hale, a man can not even excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life unless he comply. But if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion, there seems no reason why this offense may not be mitigated upon the like consideration of human infirmity. But if the party might, as Lord Hale, in one place, supposes, have recourse to the law for his protection against such threats, it will certainly be no excuse for committing murder."

In Russell on Crimes, Vol. 1, § 699, it is stated as follows: "The person committing the crime must be a free agent, and not subject to actual force at the time the act is done; thus, if A by force take the arm of B, in which is a weapon and therewith kill C, A is guilty of murder, but not B. But if it be only a moral force put upon B, as by threatening him with duress or imprisonment or even by an assault to the peril of his life in order to compel him to kill C, it is no legal excuse."

In the case of *Regina v. Tyler*, reported in 8 Car. & Payne, 618, Lord Denham, C. J., declares the law as follows: "With regard to the argument, you have heard, that these prisoners were induced to join Thom, and to continue with him from a fear of personal violence to themselves, I am bound to tell you, that where parties, for such reason, are induced to join a mischievous man, it is not

their fear of violence to themselves which can excuse their conduct to others. \* \* \* The law is that no man, from a fear of consequences to himself, has a right to make himself a party committing mischief on mankind."

In the case of *Respublicae v. McCarty*, 2 Dallas, 86, when the defendant was on trial for high treason, the court uses this language: "It must be remembered that, in the eye of the law, nothing will excuse the act of joining the enemy but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage on property."

The same rule in regard to persons charged with treason as that stated in Hale's Pleas of the Crown is declared in Hawkins, Vol. 1, Ch. 17, Sec. 28, and note, and both authors hold, that "the question of the practicability of escape is to be considered, and that if the person thus acting under compulsion continued in the treasonable acts longer than was necessary, the defense '*pro timore mortis*' will not be available."

This principle finds further support in the case of *United States v. Greiner*, tried for treason, reported in 4 Phil. 396, in the following language: "The only force which excuses on the grounds of compulsion is force upon the person and present fear of death, which force and fear must continue during all the time of military service, and that it is incumbent in such a case upon him who makes force his defense to show an actual force, and that he quitted the service as soon as he could."

Wharton's Criminal Law, Vol. 1, § 94, under the head of Persons under Compulsion, says "Compulsion may be viewed in two aspects: 1. When the immediate agent is physically forced to do the injury, as when his hand is seized by a person of superior strength, and is used against his will to strike a blow, in which case no guilt attaches to the person so coerced. 2. When the force applied is that of authority or fear. Thus, when a person not intending wrong, is swept along by a party of persons whom he cannot resist, he is not responsible, if he is compelled to do wrong by threats on the part of the offenders instantly to kill him, or to do him grievous bodily harm, if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offense. Thus, it is a defense to an indictment for treason, that the defendant was acting in obedience to a *de facto* government, or to such concurring and overbearing

sense of the community in which he resided as to imperil his life in case of dissent." In section 1803a of the same author (Wharton), it is said: "No matter what may be the shape compulsion takes, if it affects the person and he yielded to it *bona fide*, it is a legitimate defense."

We have examined the cases cited by Mr. Wharton to sustain the text, and find them to be cases of treason, or fear from the party slain, and in none of them is there a rule different from that declared in the common law authorities cited by us.

Bishop on Criminal Law, §§ 346, 347, 348, treats of the rules of law applicable to acts done under necessity and compulsion. It is here declared: "That always an act done from compulsion and necessity is not a crime. To this proposition the law knows no exception. Whatever it is necessary for a man to do to save his life, is, in general, to be considered as compelled."

The cases cited to these propositions show the facts to be different from those under consideration. The case referred in 1 Plow. 19, was where the defendant had thrown overboard a part of his cargo of green wood, during a severe tempest, to save his vessel and the remainder of his cargo. The other, 5 Q. B. 279, was for the failure to keep up a highway, which the encroachments of the sea had made impossible; and that of *Tate v. The State*, 5 Black. 73, was also that of a supervisor of a public highway, and the others were cases of treason, to which reference has been made. In section 348, the author cites the rule laid down by Russell, and also of Lord Denman, and in 1 East P. C., to which reference has already been made. In section 845, the same author uses the following language: "The cases in which a man is clearly justified in taking another's life to save his own are when the other has voluntarily placed himself in the wrong. And *probably*, as we have seen, it is never the right of one to deprive an innocent third person of life for the preservation of his own. There are, it *would seem*, circumstances in which one is bound even to die for another." Italics are ours—emphasized to call attention to the fact, that the author is careful to content himself more with a reference to the authorities, which declare these principles of law than an adoption of them as his own.

The authorities seem to be conclusive that, at common law, no man can excuse himself, under the plea of necessity or compulsion for taking the life of an innocent person.



Our statute has divided murder into two degrees, and affixed the punishment for each degree, but in no respect has added to or taken away any of the ingredients of murder as known at common law.—*Mitchell v. State*, 60 Ala. 26; *Fields v. State*, 52 Ala. 352.

That persons have exposed themselves to imminent peril and death for their fellow man, and that there are instances, where innocent persons have submitted to murderous assaults and death rather than take life is well established, but such self sacrifices emanated from other motives than the fear of legal punishment. That the fear of punishment by imprisonment or death at some future day by due process of law can operate with greater force to restrain or deter from its violation, than the fear of immediate death, unlawfully inflicted, is hardly reconcilable with our knowledge and experience with that class of mankind, who are controlled by no other higher principle than fear of the law. Be this as it may, there are other principles of law undoubtedly applicable to the facts of this case, and which we think can not be ignored.

The evidence of the defendant himself shows that he went to Burkhalter's house about nine o'clock of the night of the killing, and there met Burkhalter and Leith, and that it was there, and at that time, they told him he must kill Pogue. The evidence is not clear as to how far it was from Burkhalter's to Pogue's dwelling, where the crime was perpetrated; but it was sufficient to show that there was some considerable distance between the places, and he testifies as they went to Pogue's, they went by the mill and got the axe, with which he killed him. Under every principle of law, it was the duty of the defendant to have escaped from Burkhalter and Leith, after being informed of their intention to compel him to take the life of Pogue, as much so as it is the duty of one who had been compelled to take up arms against his own government, if he can do so with reasonable safety, to himself; or of one assailed to retreat, before taking the life of his assailant. Although it may have been true, that at the time he struck the fatal blow, that he had reason to believe he would be killed by Burkhalter and Leith, unless he killed Pogue, yet, if he had the opportunity, if it was practicable, after being informed at Burkhalter's house of their intention, he could have made his escape from them with reasonable safety, and he failed to do so, but remained with them until the time of the killing, the immediate

necessity or compulsion under which he acted at that time would be no excuse to him. As to whether escape was practicable to defendant, as we have stated, was a question of fact for the jury. The charge, numbered 1 and refused by the court, ignored this principle of law and phase of evidence, and demanded an acquittal of defendant, if at the time of the killing the compulsion and coercion operated upon the defendant, and forced him to the commission of the act, notwithstanding he might have avoided the necessity by escape before that time. We do not hesitate to say he would have been justifiable in taking the life of Burkhalter and Leith, if there had been no other way open to enable him to avoid the necessity of taking the life of an innocent man. The charge requested was erroneous and misleading, in the respect that it ignored the law and evidence in these respects.

The second charge requested was properly refused. We suppose the principle asserted is exactly the contrary of that intended. By the use and position of the negatives the charge is made to assert that unless there was a present impending necessity to strike, there could be no murder.

There is no error in the record.

It appearing that the day appointed for the execution of the sentence has passed, it is considered and ordered that Friday, the 10th of March next (1893), be and is hereby appointed and specified for the execution of the sentence of the law pronounced by the trial court, and the sheriff or his deputy, or the officer acting in his place, must execute the sentence.

Affirmed.

## III. THERE MUST BE CRIMINAL INTENT.

a. *General Intent.*

*Harvick v. State, 49 Ark. 514. (1887.)*

COCKRILL, C. J.:

Harvick was convicted of burglary. The proof showed that he had entered a barber shop in the night, and carried off five or six dollars in money and a few cigars, in all less than ten dollars in value. When discovered in the shop by two acquaintances, he withdrew, joined them and handed around the cigars, but said nothing about the money, and did not explain his presence in the shop. The next morning, after breakfast, he offered to return the money to the barber, with whom he was on friendly terms, and then explained that he had found the shop window open, and upon looking in had discovered that the safe was open, when he entered to take charge of the money only to prevent its being stolen. The barber had missed the money, and thought his safe had been burglarized, though there was no evidence of violence. He denied that the money tendered was all that had been taken; Harvick asserted that it was all he got, but readily assented to the payment of the amount claimed by the barber, making in all the amount above stated.

The only point pressed by the appellant is that the proof does not show that he entered the shop with the intent to commit a felony. His conduct when he was called from the shop, and afterwards, did not impress the jury with the truthfulness of the explanation he gave of his motive for entering the house and carrying off the money and cigars, and their verdict fixes the conclusion that he entered with intent to steal.

But one who commits larceny of property of the value of ten dollars or less, is, under our statute, guilty of a misdemeanor only (*Mansf. Dig., sec. 1627*); and as the crime of burglary is complete only when the breaking is done or the entry made with the intent to commit a felony, the offense is not committed by one who breaks into or enters a house with intent to commit petit larceny only. As every larceny was a felony at common law, it was enough then to show an intent to commit larceny; but when petit larceny is reduced to a misdemeanor, the breaking or entry with intent to

commit that crime, will not constitute burglary. The precise question was ruled in *People v. Murray*, 8 Cal., 520; see, too, 1 Bish. Cr. Law, sec. 736; 2 id., sec. 110; 1 Russell on Crimes, p. 823; Wharton Cr. Law, sec. 810; Mansf. Dig., secs. 1616, 1618. Section 1619, of Mansfield's Digest, does not affect the question. It cannot be construed to mean that one who enters a building with intent to commit a larceny less than a felony, is guilty of burglary. It was designed simply to punish the burglar for any felony or larceny he might actually commit after entering the building, as readily as though no burglary had been committed. It authorizes a conviction of the larceny committed in the building, in addition to, or independently of the burglary. For the offense of burglary it retains the elements of the statutory definition—that is, an unlawful breaking or entry in the night with intent to commit a felony. Sec. 1616, *supra*.

It is argued that the prisoner could not have intended to steal more than he could find, and that as all the money in the safe did not amount to ten dollars, he could not have intended to commit a felony.

But the jury have not specially found that he intended to steal money alone. He entered, according to their verdict, with the intent to steal, generally; he was interrupted in the act when there was more than ten dollars worth of personal property, such as cigars, razors, etc., in his reach. It was not necessary, in order to complete the crime of burglary, that his anterior intent should have been consummated. *Dodd v. State*, 33 Ark., 517. Who can say that it was his intent to confine his operations to the money in the safe? In point of fact, he did not. He took cigars as well as money. We may gather the intent from the act done. A man is presumed to intend what he does, and the jury could have inferred that, but for the interruption, the prisoner would have appropriated other property as well.

But if there had been no other property except that taken, the case would not be altered. The prisoner intended to take all the money there was in the safe. He testified to that fact upon the stand. He did not know that it contained less than ten dollars. His intent was to take more than that sum if he could find it, hence the intent to commit a felony.

Where an assault upon a person with intent to steal from his pocket is a criminal offense, it is no answer to the indictment,

as has been frequently held, that the pocket was empty. 1 Bish. Cr. Law, sec. 743, *et seq.*

The same rule was applied in a recent Ohio case, where one who was indicted for breaking into a building with intent to steal money which he supposed was in a safe, though in fact the safe contained no money. A conviction of burglary was sustained. *State v. Beall*, 37 Ohio St., 108.

In the case of this appellant his acts and declarations show that he intended to appropriate the contents of the safe, whether much or little. The unforeseen circumstance of the barber's light till, which alone prevented him from taking more than ten dollars, tends no more to remove the felonious intent than if he had been unexpectedly driven away from the fullest coffers by a physical force which rendered his intent to help himself to great wealth impossible.

Affirmed.

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*b. Concurrence of Act and Intent.*

*Gordon v. State*, 52 Ala. 308. (1875.)

BRICKELL, C. J.:

This indictment is founded on the fortieth section of the statute, approved April 22, 1873, entitled "An act to regulate elections in the State of Alabama," which declares: "That any person voting more than once at any election held in this State, or depositing more than one ballot for the same office at such election, or is guilty of any other kind of illegal or fraudulent voting, shall be deemed guilty of a felony," etc. Pamph. Acts 1872-3, p. 25. The first count charges that the appellant, not being of the age of twenty-one years, voted at the last general election in this State. The second count is a general accusation of illegal voting, not specifying in what the illegality consisted, whether in a want of legal qualification, or in voting more than once, or in depositing more ballots than one, and is not sufficient to support a conviction. 2 Bish. Cr. Pr. § 275. The evidence, as disclosed in the bill of exceptions, tended only to support the charge contained in the first count. Two witnesses were examined on the behalf of defendant; one, his mother, and the other an acquaintance who had known him from his birth, and resided in the same neighborhood.

and for a long time a member of the same family with defendant, and they testified the defendant was of the age of twenty-one years, in the August preceding the election. That they had frequently told defendant he would be of full age in that month, and subsequently and before the election told him he was of age. The court refused to charge the jury that if the defendant, in reliance on these statements, honestly believed he was of full age when he voted, he should not be convicted, if the evidence convinced the jury he was not of age.

“All crime exists, primarily, in the mind.” A wrongful act and a wrongful intent must concur, to constitute what the law deems a crime. When an act denounced by the law is proved to have been committed, in the absence of countervailing evidence, the criminal intent is inferred from the commission of the act. The inference may be, and often is, removed by the attending circumstances, showing the absence of a criminal intent. Ignorance of law is never an excuse, whether a party is charged civilly or criminally. Ignorance of fact may often be received to absolve a party from civil or criminal responsibility. On the presumption that every one capable of acting for himself knows the law, courts are compelled to proceed. If it should be abandoned, the administration of justice would be impossible, as every cause would be embarrassed with the collateral inquiry of the extent of legal knowledge of the parties seeking to enforce or avoid liability and responsibility.

The criminal intention being of the essence of crime, if the intent is dependent on a knowledge of particular facts, a want of such knowledge, not the result of carelessness or negligence, relieves the act of criminality. An illustration may be found in the vending of obscene or immoral publications. A knowledge of the character of such publications is an indispensable ingredient of the offence. From the vending it would be inferable; but if it appeared the vendor was blind, and in the course of his trade happened innocently to make the sale, a want of knowledge of the character of the publication would relieve him from criminal responsibility. A man having in his possession counterfeit coin, or forged bank bills, with intent to put them in circulation, could not be convicted of crime, if he was ignorant of their spuriousness. A statute imposed a penalty on the owner or captain of any steamboat receiving and transporting any colored person, without having particular evidence that such person

was free. The penalty could be inflicted only on the captain or owner who knowingly transported such person. If the person of color, without the knowledge or consent of the captain or owner, entered the boat, concealing himself, and was thus carried away, the penalty was not incurred. *Duncan v. State*, 7 Humph. 148.

Illegal voting, when it is supposed to arise from the want of legal qualifications, is dependent on the voter's knowledge of the particular facts which make up the qualification. Every man is bound to know the law requires that every voter shall be a native born or naturalized citizen of the United States, of the age of twenty-one years, and have resided in the State six months, and the county in which he offers to vote, three months next preceding the election, and must not have been convicted of the offences mentioned in the Constitution as the disqualification of an elector. He is bound to exercise reasonable diligence to ascertain the facts which enter into and form these qualifications. Having exercised this diligence, if he resided near the boundary line of a county, and should be informed by those having the means of knowledge that his residence was within the county, and he, without a knowledge of the real facts, honestly acting on this information, should vote, he could not fairly be charged with illegal voting, though on a subsequent survey, or on some other evidence, it should be ascertained his residence was not within the county. The precise time when a man arrives at the age of twenty-one years is a fact, knowledge of which he derives necessarily from his parents, or other relatives or acquaintances having knowledge of the time of his birth. If acting in good faith, on information fairly obtained from them under an honest belief that he had reached the age, he votes, having the other necessary qualifications, illegal voting should not be imputed to him. The intent which makes up the crime cannot be affirmed. Whether he had the belief that he was a qualified voter, and the information was fairly obtained, should be referred to, and determined by the jury. The whole inquiry should be directed to the voter's knowledge of facts, and to his diligence in acquiring the requisite knowledge. If he votes recklessly or carelessly, when the facts are doubtful or uncertain, his ignorance should not excuse him, if the real facts show he was not qualified. If ignorant of the disqualifying fact, and without a want of diligence, under an honest belief of his right to vote, he should be excused, though

he had not the right. 2 Bish. Cr. Law, §§ 276-279; *State v. Boyett*, 10 Ired. 336; *McGuire v. State*, 7 Humph. 54; *Commonwealth v. Bradford*, 9 Met. 268; *Commonwealth v. Aglar*, Thatcher's Cr. Cases, 412.

The charge given by the circuit court, and several of the refusals to charge, were according to these views erroneous, and the judgment must be reversed, and the cause remanded. The appellant must remain in custody until discharged by due course of law.

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*c. Constructive Intent.*

*McGehee v. State*, 62 Miss. 772. (1885.)

ARNOLD, J., delivered the opinion of the court.

Appellant was convicted of assault with intent to kill and murder Levi Thompson and sentenced to one year's imprisonment in the penitentiary. At a public gathering about twelve o'clock at night one George Morris had a difficulty with appellant's brother and cut and seriously wounded him. Afterward Morris started home and appellant followed him, intending, it seems, to avenge the injury suffered by his brother. It was a very dark night, and appellant overtook Levi Thompson in the road, who had started before him, going in the same direction, and, supposing him to be George Morris, cut and dangerously wounded him with a knife. As soon as Thompson was struck he spoke, and appellant desisted and ran rapidly away. It was so dark that Thompson could not see or tell who it was that struck him. On the next morning appellant admitted that he was the person who cut Thompson, and said he thought he was cutting George Morris; that he did not intend to cut Thompson and was sorry he had mistaken him for Morris, and that if it had been Morris he would have cut him to pieces. Appellant and Thompson were the best of friends and there had never been any difficulty between them before.

It is urged for appellant that the intent charged was not proved.

Thompson was the only person in reach of appellant at the time he committed the offense with which he is charged. He intended to assault that person with a weapon which the jury found to be a deadly weapon. His blows did not miss the object at which they were aimed. He may not have intended to kill Thompson, but he



was properly convicted if he intended to kill the man at whom the knife was directed. The evil and specific intent to strike the form before him at the time is manifest, and that form proved to be Thompson. That there was a mistake as to the identity of the person intended to be injured constitutes no defense. If appellant did to Thompson what he intended to do to Morris, he is as guilty under the statute as if no mistake had been made. 2 Whart. Cr. Law, § 1279; 1 Russ. on Crimes, 1001, 1002 (ninth ed.); *Regina v. Smith*, 33 Eng. Law and Eq. 567; *Regina v. Lynch*, 1 Cox C. C. 361.

And this is not in conflict with the settled doctrine in this State that on a charge under the statute of assault with a deadly weapon, with intent to kill and murder a particular person, it is necessary to prove the specific intent as laid in the indictment. There is no error in the record.

*The judgment is affirmed.*

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*d. Crime Without Intent.*

*People v. Roby*, 52 Mich. 577. (1884.)

COOLEY, C. J.:

The respondent who is keeper of a hotel in the village of Plainwell, in which there is a bar for the sale of spirituous and malt liquors, was prosecuted and convicted for not keeping his bar closed on Sunday, May 6, 1883. The evidence was that on the morning of that day the clerk of the hotel was in the bar-room and had a servant with him scrubbing it out when a person came in from the street. He appeared to be known to the clerk, who told him he did not want him there Sundays. The man said he wanted some whisky. The clerk told him he must get his whisky Saturday night. After some more words between them the clerk told him if he was going to get the whisky to get it and get out as soon as he could. He got the whisky, handed pay for it to the servant, and went off. The respondent was not at the time present. The clerk testifies that he was somewhere about the house, but he thought he was not up yet; the servant says he was about there shortly afterwards. There was no evidence in the case to show that respondent assented to the opening of the bar on that day, or expected or desired that it should be opened; neither was there

any evidence to the contrary. He was not a witness on his own behalf.

The case comes to this Court on writ of error, and the only question of importance is whether there was any evidence to be submitted to the jury.

The statute under which the conviction was had provides that "all saloons, restaurants, bars, in taverns or elsewhere, and all other places where any of the liquors," etc. "may be sold, or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called Sunday," etc. How. St. § 2274; Public Acts, 1881, p. 350.

It will be observed that the requirement that the saloons and other places mentioned shall be closed is positive. The next section of the statute provides that any person who shall violate this, among other provisions, shall be deemed guilty of a misdemeanor, and shall be punished as therein prescribed. In terms, then, the penalties of the statute are denounced against the person whose saloon or other place for the sale of intoxicating drinks is not kept closed, and no other fact is necessary to complete the offense.

It is contended, nevertheless, that to constitute an offense under the section referred to, there must be some evidence tending to show an intent on the part of the respondent to violate it; and *People v. Parks*, 49 Mich., 333, which was a prosecution under another section of the same statute, is cited as authority. It should be said of that case that the facts are not fully given in the report, and that there was positive evidence in the case to negative the intent in the respondent that the criminal act should be committed. But the case is plainly distinguishable from this. The section under which Parks was prosecuted makes not only the proprietor, but his clerks, agents, etc., individually liable for the conduct prohibited, and imposes upon them severally the duty to abstain from it. The section under which Roby is prosecuted makes the crime consist, not in the affirmative act of any person, but in the negative conduct of failing to keep the saloon, etc., closed.

I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence; and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties

irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible. Thus, in Massachusetts a person may be convicted of the crime of selling intoxicating liquor as a beverage, though he did not know it to be intoxicating; *Commonwealth v. Boynton*, 2 Allen, 160; and of the offense of selling adulterated milk, though he was ignorant of its being adulterated. *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Holbrook*, 10 Allen, 200; *Commonwealth v. Waite*, 11 Allen, 264; *Commonwealth v. Smith*, 103 Mass., 444. See *State v. Smith*, 10 R. I. 258. In Missouri a magistrate may be liable to the penalty for performing the marriage ceremony for minors without consent of parents or guardians, though he may suppose them to be of the proper age. *Beckham v. Nacke*, 56 Mo., 546. Where the killing and sale of a calf under a specified age is prohibited, there may be a conviction though the party was ignorant of the animal's age. *Commonwealth v. Raymond*, 97 Mass., 567. See *The King v. Dixon*, 3 M. & S., 11. In *State v. Steamboat Co.*, 13 Md., 181, a common carrier was held liable to a statutory penalty for transporting a slave on its steamboat, though the persons in charge of its business had no knowledge of the fact. A case determined on the same principle is *Queen v. Bishop*, 5 Q. B. Div., 259. If one's business is the sale of liquors, a sale made by his agent in violation of law is *prima facie* by his authority; *Commonwealth v. Nichols*, 10 Met., 259; and in Illinois the principal is held liable, though the sale by his agent was in violation of instructions. *Noecker v. People*, 91 Ill., 494. In Connecticut it has been held no defense in a prosecution for selling intoxicating liquor to a common drunkard that the seller did not know him to be such. *Barnes v. State*, 19 Conn., 398. It was held in *Faulks v. People*, 39 Mich., 200, under a former statute, that one should not be convicted of the offense of selling liquors to a minor who had reason to believe and did believe he was of age; but I doubt if we ought so to hold under the statute of 1881, the purpose of which very plainly is, as I think, to compel every person who engages in the sale of intoxicating drinks to keep within the statute at his peril. There are many cases in which it has been held under similar statutes that it was no defense that the seller did not know or suppose the purchaser to be a minor; *State v. Hartfield*, 24 Wis., 60; *McCutcheon v. People*, 69 Ill., 601; *Farmer*

v. *People*, 77 Ill., 322; *Ulrich v. Commonwealth*, 6 Bush., 400; *State v. Cain*, 9 W. Va., 559; *Commonwealth v. Emmons*, 98 Mass., 6; *Redmond v. State*, 36 Ark., 58; and in *Commonwealth v. Finnegan*, 124 Mass., 324, the seller was held liable, though the minor had deceived him by falsely pretending he was sent for the liquor by another person. So a person has been held liable to a penalty for keeping naphtha for sale under an assumed name, without guilty knowledge; the statute not making such knowledge an ingredient of the offense. *Commonwealth v. Wentworth*, 118 Mass., 441. Other cases might be cited, and there is nothing anomalous in these. A person may be criminally liable for adultery with a woman he did not know to be married: *Fox v. State*, 3 Tex. App., 329; or for the carnal knowledge of a female under ten years of age though he believed her to be older. *Queen v. Prince*, L. R. 2, Cr. Cas. 154; *State v. Newton*, 44 Ia., 45. And other similar cases might be instanced.

If intent were necessary to be found I should be of opinion there was enough in the case to warrant its submission to the jury. The bar was opened on Sunday by respondent's servants and on his business while he was about the premises. The purpose for which it was opened was immaterial; the offense was committed by opening it for cleaning as much as it would have been by opening it for the sale of liquors. *People v. Waldvogel*, 49 Mich., 337. But the statute requires the proprietor at his peril to keep the bar closed. The purpose in doing so is that persons shall not be there within the reach of temptation. This respondent did not keep his bar closed and he has therefore disobeyed the law. And he has not only disobeyed the law, but the evil which the law intends to guard against has resulted; that is to say, there has been, either with or without his assent,—it is immaterial which,—a sale of intoxicating liquors to a person who took advantage of the bar being open to enter it.

I think the circuit court should proceed to judgment.

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*e. Mistake of Law.*

*United States v. Anthony*, 11 Blatchf. 200. (1873.)

Indictment against Susan B. Anthony for a violation of the act of congress of May 31, 1870 (16 Stat. 744), which provides "that if, at any election for representative \* \* \* in the congress

of the United States, any person shall knowingly \* \* \* vote without having a lawful right to vote, \* \* \* every such person shall be deemed guilty of a crime, and shall, for such crime, be liable to prosecution in any court of the United States of competent jurisdiction, and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or both, in the discretion of the court, and shall pay the costs of prosecution."

The defendant claimed, *inter alia*, that the act was unconstitutional in so far as it prohibited women from voting.

HUNT, J., after considering the constitutional questions involved, and holding the act valid, said:

The fourteenth amendment gives no right to a woman to vote, and the voting by Miss Anthony was in violation of law. If she believed she had a right to vote, and voted in reliance upon that belief, does that relieve her from the penalty? It is argued that the knowledge referred to in the act relates to her knowledge of the illegality of the act, and not to the act of voting; for, it is said, that she must know that she voted. Two principles apply here: First, ignorance of the law excuses no one; second, every person is presumed to understand and to intend the necessary effects of his own acts. Miss Anthony knew that she was a woman, and that the constitution of this State prohibits her from voting. She intended to violate that provision—intended to test it, perhaps, but certainly intended to violate it. The necessary effect of her act was to violate it, and this she is presumed to have intended. There was no ignorance of any fact, but, all the facts being known, she undertook to settle a principle in her own person. She takes the risk, and she cannot escape the consequences. It is said, and authorities are cited to sustain the position, that there can be no crime unless there is a culpable intent, and that, to render one criminally responsible, a vicious will must be present. A commits a trespass on the land of B, and B, thinking and believing that he has a right to shoot an intruder upon his premises, kills A on the spot. Does B's misapprehension of his rights justify his act? Would a judge be justified in charging the jury that, if satisfied that B supposed he had a right to shoot A, he was justified, and they should find a verdict of not guilty? No judge would make such a charge. To constitute a crime, it is true that there must

be a criminal intent, but it is equally true that knowledge of the facts of the case is always held to supply this intent. An intentional killing bears with it evidence of malice in law. Whoever, without justifiable cause, intentionally kills his neighbor, is guilty of a crime. The principle is the same in the case before us, and in all criminal cases. The precise question now before me has been several times decided, viz., that one illegally voting was bound and was assumed to know the law, and that a belief that he had a right to vote gave no defense, if there was no mistake of fact. *Hamilton v. People*, 57 Barb. 625; *State v. Boyett*, 10 Ired. 336; *State v. Hart*, 6 Jones (N. C.) 389; *McGuire v. State*, 7 Humph. 54; *State v. Sheeley*, 15 Iowa, 404. No system of criminal jurisprudence can be sustained upon any other principle. Assuming that Miss Anthony believed she had a right to vote, that fact constitutes no defense, if, in truth, she had not the right. She voluntarily gave a vote which was illegal, and thus is subject to the penalty of the law.

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*f. Mistake of Fact.*

*Squire v. State*, 46 Ind. 459. (1874.)

BUSKIRK, J.:

This was a prosecution for bigamy. The appellant, upon a plea of not guilty, was tried by a jury, and found guilty, and, over motions for a new trial and in arrest, judgment was rendered on the verdict.

The appellant requested the court to give the following instruction: "That if the jury believe, from all the evidence in the case, that the defendant married the second time in the honest belief that his former wife had been divorced from him, they should find him not guilty"; but the court refused to so charge, and this refusal was assigned as a reason for a new trial, and is relied upon here to reverse the judgment.

The appellant testified in his own behalf. The substance of his testimony was that he left the State of New York about two years ago, and came to this State, where he had resided ever since; that he left his wife in the city of Buffalo, in the State of New York, she refusing to come west with him; that he came to Washington, Daviess county, Ind., in July, 1873, where he had ever since re-

sided, and still resides; that he had not been in the State of New York since he left there, two years ago, but he had received letters from his parents and brothers in the State of New York, informing him that his wife, Elizabeth, had procured a divorce from him in said State of New York; and that he had married the said Ruth Summers under the belief that such information was true.

Bishop on Criminal Law, in section 303 (Volume 1, p. 187), says: "The wrongful intent being the essence of every crime, the doctrine necessarily follows that, whenever a man is misled without his own fault or carelessness concerning facts, and, while so misled, acts as he would be justified in doing were the facts what he believes them to be, he is legally innocent, the same as he is innocent morally."

The same author, in his work on Statutory Crimes, in section 355, p. 234, says: "In the cases mentioned in the preceding sections there is no crime, because, by a rule of the common law, there can be none where the criminal mind is wanting. But the reason why it is wanting in these cases is that, either in consequence of a technical rule or by force of a natural fact, it is impossible the criminal mind should exist, since that cannot be for whose existence there is no capacity. But there may be a capacity for the criminal intent, while yet no crime is committed, even though the outward fact of what otherwise were crime transpires. It is so where one having a mind free from all moral culpability is misled concerning facts. If, in such a case, he honestly believes certain facts to exist, and, though they do not, acts as he would be legally justified in acting if what he erroneously believes to be were real, he is justified in law, the same as he is in morals. The books are full of illustrations of this doctrine; and the reader perceives that, in reason, it must govern statutory crimes, the same as crimes at the common law."

The same author, in section 356, illustrates the above doctrine as applicable to a prosecution for bigamy, when he says: "But this exception has no relation to a case in which on independent information and special grounds, a husband or wife is really believed to be dead. Suppose, for example, a husband intending to entrap his wife, goes out ostensibly on a sail with confederates, and they come back and represent that he is drowned, while he secretly escapes abroad. She believes the statement, administers on his effects, and at the end of a year marries. Then he returns

and procures her indictment for polygamy. On a just consideration, the common-law rule, and not the statutory one prevails, and she should be acquitted." The same rule would apply to the dissolution of the marriage relation by divorce as by death.

We think the court should have charged the jury, if it had been so asked, that if they believed from the evidence that the defendant had been informed that his wife had been divorced, and that he had used due care and made due inquiry to ascertain the truth, and had, considering all the circumstances, reason to believe, and did believe, at the time of his second marriage, that his former wife had been divorced from him, they should find him not guilty.

There was probably no error in refusing the instruction as asked, as it was based solely upon the belief of the defendant, and did not require that such belief should be the result of due care and careful inquiry, and that he should have reasonable grounds to entertain such belief.

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#### IV. THERE MUST BE SUFFICIENT MENTAL CAPACITY.

##### *a. Insanity.*

*Parsons v. State, 81 Ala. 577. (1886.)*

SOMERVILLE, J.:

In this case the defendants have been convicted of the murder of Bennett Parsons, by shooting him with a gun, one of the defendants being the wife and the other the daughter of the deceased. The defense set up in the trial was the plea of insanity, the evidence tending to show that the daughter was an idiot, and the mother and wife a lunatic, subject to insane delusions, and that the killing on her part was the offspring and product of those delusions.

The rulings of the court raise some questions of no less difficulty than of interest, for, as observed by a distinguished American judge, "of all medico-legal questions, those connected with insanity are the most difficult and perplexing." Per DILLON, C. J., in *State v. Felter*, 35 Iowa 67. It has become of late a matter of comment among intelligent men, including the most advanced thinkers in the medical and legal professions, that the deliverances of the law courts on this branch of our jurisprudence



have not heretofore been at all satisfactory, either in the soundness of their theories, or in their practical application. The earliest English decisions, striving to establish rules and tests on the subject, including alike the legal rules of criminal and civil responsibility, and the supposed tests of the existence of the disease of insanity itself, are now admitted to have been deplorably erroneous, and, to say nothing of their vacillating character, have long since been abandoned. The views of the ablest of the old text writers and sages of the law were equally confused and uncertain in the treatment of these subjects, and they are now entirely exploded. Time was in the history of our laws that the veriest lunatic was debarred from pleading his providential affliction as a defense to his contracts. It was said, in justification of so absurd a rule, that no one could be permitted to stultify himself by pleading his own disability. So great a jurist as Lord Coke, in his attempted classification of madmen, laid down the legal rule of criminal responsibility to be that one should "*wholly* have lost his memory and understanding"; as to which Mr. Erskine, when defending Hadfield for shooting the King, in the year 1800, justly observed: "No such madman ever existed in the world." After this great and historical case, the existence of delusion promised for a while to become the sole test of insanity, and acting under the duress of such delusion was recognized in effect as the legal rule of responsibility. Lord Kenyon, after ordering a verdict of acquittal in that case, declared with emphasis that there was "no doubt on earth" the law was correctly stated in the argument of counsel. But, as it was soon discovered that insanity often existed without delusions, as well as delusions without insanity, this view was also abandoned. Lord Hale had before declared that the rule of responsibility was measured by the mental capacity possessed by a child fourteen years of age, and Mr. Justice Tracy, and other judges, had ventured to decide that, to be non-punishable for alleged acts of crime, "a man must be totally deprived of his understanding and memory, so as not to know what he was doing—no more than an infant, a brute, or a *wild beast*."—*Arnold's case*, 16 How. St. Tr. 764. All these rules have necessarily been discarded in modern times in the light of the new scientific knowledge acquired by a more thorough study of the disease of insanity. In *Bellingham's Case*, decided in 1812, by Lord Mansfield at the Old Bailey (Coll. on Lun. 630), the test

was held to consist in a knowledge that murder, the crime there committed, was "against the laws of God and nature," thus meaning an ability to distinguish between right and wrong in the abstract. This rule was not adhered to, but seems to have been modified so as to make the test rather a knowledge of right and wrong as applied to the particular act.—Lawson on Insanity, 231, § 7 *et seq.* The great leading case on this subject in England, is *McNaghten's case*, decided in 1843 before the English House of Lords, 10 Cl. & F. 200; s. c., 2 Lawson's Cr. Def. 150. It was decided by the judges in that case, that, in order to entitle the accused to acquittal, it must be clearly proved that, at the time of committing the offense, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did, not to know that what he was doing was wrong. This rule is commonly supposed to have heretofore been adopted by this court, and has been followed by the general current of American adjudications.—*Boswell v. The State*, 63 Ala. 307; s. c., 35 Amer. Rep. 20; s. c., 2 Lawson's Cr. Def. 352; *McAllister v. State*, 17 Ala. 434; Lawson on Insanity, 219-221, 231.

In view of these conflicting decisions, and of the new light thrown on the disease of insanity by the discoveries of modern psychological medicine, the courts of the country may well hesitate before blindly following in the unsteady footsteps found upon the old sandstones of our common law jurisprudence a century ago. The trial court, with prudent propriety, followed the previous decisions of this court, the correctness of which, as to this subject, we are now requested to review.

We do not hesitate to say that we re-open the discussion of this subject with no little reluctance, having long hesitated to disturb our past decisions on this branch of the law. Nothing could induce us to do so except an imperious sense of duty, which has been excited by a protracted investigation and study, impressing our minds with the conviction that the law of insanity as declared by the courts on many points, and especially the rule of criminal accountability, and the assumed tests of disease, to that extent which confers legal irresponsibility, have not kept pace with the progress of thought and discovery, in the present advanced stages of medical science. Though science has led the way, the courts of England have declined to follow, as shown by their

adherence to the rulings in *McNaghten's case*, emphasized by the strange declaration made by the Lord Chancellor of England, in the House of Lords, on so late a day as March 11, 1862, that "the introduction of medical opinions and medical theories into this subject has proceeded upon *the vicious principle of considering insanity as a disease!*"

It is not surprising that this state of affairs has elicited from a learned law writer, who treats of this subject, the humiliating declaration, that, under the influence of these ancient theories, "the memorials of our jurisprudence are written all over with cases in which those who are now understood to have been insane, have been executed as criminals."—1 Bish. Cr. Law (7th Ed.), § 390. There is good reason, both for this fact, and for the existence of unsatisfactory rules on this subject. In what we say we do not intend to give countenance to acquittals of criminals, frequent examples of which have been witnessed in modern times, based on the doctrine of moral or emotional insanity, unconnected with mental disease, which is not yet sufficiently supported by psychology, or recognized by law as an excuse for crime.—*Boswell's case, supra*; 1 Whar. Cr. Law (9th Ed.), § 43.

In ancient times, lunatics were not regarded as "unfortunate sufferers from disease, but rather as subjects of demoniacal possession, or as self-made victims of evil passions." They were not cared for humanely in asylums and hospitals, but were incarcerated in jails, punished with chains and stripes, and often sentenced to death by burning or the gibbet. When put on their trial, the issue before the court then was not as now. If acquitted, they could only be turned loose on the community to repeat their crimes without molestation or restraint. They could not be committed to hospitals, as at the present day, to be kept in custody, cared for by medical attention, and often cured. It was not until the beginning of the present century that the progress of Christian civilization asserted itself by the exposure of the then existing barbarities, and that the outcry of philanthropists succeeded in eliciting an investigation of the British Parliament looking to their suppression. Up to that period the medical treatment of the insane is known to have been conducted upon a basis of ignorance, inhumanity, and empiricism.—*Amer. Cyclop.*, Vol. 9 (1874), *title, INSANITY*. Being punished for wickedness, rather than treated for disease, this is not surprising. The exposure of these evils

not only led to the establishment of that most beneficent of modern civilized charities—the Hospital and Asylum for the Insane—but also furnished hitherto unequalled opportunities to the medical profession of investigating and treating insanity on the pathological basis of its being a disease of the mind. Under these new and more favorable conditions the medical jurisprudence of insanity has assumed an entirely new phase. The nature and exciting causes of the disease have been thoroughly studied and more fully comprehended. The result is that the “right and wrong test,” as it is sometimes called, which, it must be remembered, itself originated with the medical profession, in the mere dawn of the scientific knowledge of insanity, has been condemned by the great current of modern medical authorities, who believe it to be “founded on an ignorant and imperfect view of the disease.” *Encyc. Brit.*, Vol. 15 (9th Ed.), *title*, INSANITY.

The question then presented seems to be, whether an old rule of legal responsibility shall be adhered to, based on theories of physicians promulgated a hundred years ago, which refuse to recognize any evidence of insanity, except the single test of mental capacity to distinguish right and wrong—or whether the courts will recognize as a possible fact, if capable of proof by clear and satisfactory testimony, the doctrine, now alleged by those of the medical profession who have made insanity a special subject of investigation, that the old test is wrong, and that there is no single test by which the existence of the disease, to that degree which exempts from punishment, can in every case be infallibly detected. The inquiry must not be unduly obstructed by the doctrine of *stare decisis*, for the life of the common law system and the hope of its permanency consist largely in its power of adaptation to new scientific discoveries, and the requirements of an ever advancing civilization. There is inherent in it the vital principle of juridical evolution, which preserves itself by a constant struggle for approximation to the highest practical wisdom. It is not like the laws of the Medes and Persians, which could not be changed. In establishing any new rule, we should strive, however, to have proper regard for two opposite aspects of the subject, lest, in the words of Lord Hale, “on one side, there be a kind of inhumanity towards the defects of human nature; or, on the other, too great indulgence to great crimes.”

It is everywhere admitted, and as to this there can be no doubt,

that an idiot, lunatic, or other person of diseased mind, who is afflicted to such extent as not to know whether he is doing right or wrong, is not punishable for any act which he may do while in that state.

Can the courts justly say, however, that the only test or rule of responsibility in criminal cases is the power to distinguish right from wrong, whether in the abstract, or as applied to the particular case? Or may there not be insane persons, of a diseased brain, who, while capable of perceiving the difference between right and wrong, are, as matter of fact, so far under *the duress of such disease* as to destroy *the power to choose* between right and wrong? Will the courts assume as a fact, not to be rebutted by any amount of evidence, or any new discoveries of medical science, that there is, and can be no such state of the mind as that described by a writer on psychological medicine, as one "in which the reason has lost its empire over the passions, and the actions by which they are manifested, to such a degree that the individual can neither repress the former, nor abstain from the latter?"—Dean's Med. Jur. 497.

Much confusion can be avoided in the discussion of this subject by separating the duty of the jury from that of the court in the trial of a case of this character. The province of the jury is to determine facts, that of the court to state the law. The rule in *McNaghten's case* arrogates to the court, in legal effect, the right to assert, as matter of law, the following propositions:

(1) That there is but a single test of the existence of that degree of insanity, such as confers irresponsibility for crime.

(2) That there does not exist any case of such insanity in which that single test—the capacity to distinguish right from wrong—does not appear.

(3) That all other evidences of alleged insanity, supposed by physicians and experts, to indicate a destruction of the freedom of the human will, and the irresistible duress of one's actions, do not destroy his mental capacity to entertain a criminal intent.

The whole difficulty, as justly said by the Supreme Judicial Court of New Hampshire, is, that "courts have undertaken to declare that to be law which is *matter of fact*." "If," observes the same court, "the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer

testify without being sworn as a witness, and showing himself to be qualified to testify as an expert.”—*State v. Pike*, 49 N. H. 399.

We first consider what is *the proper legal rule of responsibility in criminal cases*.

No one can deny that there must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (1) Capacity of intellectual discrimination; and (2) freedom of will. Mr. Wharton, after recognizing this fundamental and obvious principle, observes: “If there be either incapacity to distinguish between right and wrong as to the particular act, or delusion as to the act, or inability to refrain from doing the act, there is no responsibility.”—1 Whar. Cr. Law (9th Ed.), § 33. Says Mr. Bishop, in discussing this subject: “There can not be, and there is not, in any locality, or age, a law punishing men for what they can not avoid.”—1 Bish. Cr. Law (7th Ed.), § 383*b*.

If, therefore, it be true, as matter of fact, that the disease of insanity can, in its action on the human brain through a shattered nervous organization, or in any other mode, so affect the mind as to subvert the freedom of the will, and thereby destroy the power of the victim *to choose* between the right and wrong, although he perceive it—by which we mean the power of volition to adhere in action to the right and abstain from the wrong—is such a one criminally responsible for an act done under the influence of such controlling disease? We clearly think not, and such, we believe to be the just, reasonable, and humane rule, towards which all the modern authorities in this country, legislation in England, and the laws of other civilized countries of the world, are gradually, but surely tending, as we shall further on attempt more fully to show.

We next consider the question as to the *probable existence of such a disease*, and the *test of its presence* in a given case.

It will not do for the courts to dogmatically deny the possible existence of such a *disease*, or its pathological and psychical effects, because this is a matter of evidence, not of law, or judicial cognizance. Its existence, and effect on the mind and conduct of the patient, is a question of fact to be proved, just as much as the possible existence of cholera or yellow fever formerly was before these diseases became the subjects of common knowledge, or the effects of delirium from fever, or intoxication from opium and

alcoholic stimulants would be. The courts could, with just as much propriety, years ago, have denied the existence of the Copernican system of the universe, the efficacy of steam and electricity as a motive power, or the possibility of communication in a few moments between the continents of Europe and America by the magnetic telegraph, or that of the instantaneous transmission of the human voice from one distant city to another by the use of the telephone. These are scientific facts, first discovered by experts before becoming matters of common knowledge. So, in like manner, must be every other unknown scientific fact in whatever profession or department of knowledge. The existence of such a cerebral disease, as that which we have described, is earnestly alleged by the superintendents of insane hospitals, and other experts, who constantly have experimental dealings with the insane, and they are permitted every day to so testify before juries. The truth of their testimony—or what is the same thing, the existence or non-existence of such a disease of the mind—in each particular case, is necessarily a matter for the determination of the jury from the evidence.

So it is equally obvious that the courts, can not, upon any sound principle, undertake to say what are the invariable or infallible tests of such disease. The attempt has been repeatedly made, and has proved a confessed failure in practice. "Such a test," says Mr. Bishop, "has never been found, not because those who have searched for it have not been able and diligent, but because it does not exist."—1 Bish. Cr. Law (7th Ed.), § 381. In this conclusion, Dr. Ray, in his learned work on the Medical Jurisprudence of Insanity, fully concurs—Ray's Med. Jur. Ins. p. 39. The symptoms and causes of insanity are so variable, and its pathology so complex, that no two cases may be just alike. "The fact of its existence," says Dr. Ray, "is never established by any single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case."—Ray's Med. Jur. of Ins., § 24. Its exciting causes being moral, psychical, and physical, are the especial subjects of specialists' study. What effect may be exerted on the given patient by age, sex, occupation, the seasons, personal surroundings, hereditary transmission, and other causes, is the subject of evidence based on investigation, diagnosis, observation, and experiment. Peculiar opportunities, never before enjoyed in the history of our race, are offered in the present age for the ascertainment of these facts, by

the establishment of asylums for the custody and treatment of the insane, which Christian benevolence and statesmanship have substituted for jails and gibbets. The testimony of these experts—differ as they may in many doubtful cases—would seem to be the best which can be obtained, however unsatisfactory it may be in some respects.

In the present state of our law, under the rule in *McNaghten's case*, we are confronted with this practical difficulty, which itself demonstrates the defects of the rule. The courts in effect charge the juries, as matter of law, that no such mental disease exists, as that often testified to by medical writers, superintendents of insane hospitals, and other experts—that there can be as matter of scientific fact no cerebral defect, congenital or acquired, which destroys the patient's power of self-control—his liberty of will and action—provided only he retains a mental consciousness of right and wrong. The experts are immediately put under oath, and tell the juries just the contrary, as matter of evidence; asserting that no one of ordinary intelligence can spend an hour in the wards of an insane asylum without discovering such cases, and in fact that “the whole management of such asylums presupposes a knowledge of right and wrong on the part of their inmates.”—Guy & F. on Forensic Med. 220. The result in practice, we repeat, is, that the courts charge one way, and the jury, following an alleged higher law of humanity, find another, in harmony with the evidence.

In Bucknill on Criminal Lunacy, p. 59, it is asserted as “the result of observation and experience, that in all lunatics, and in the most degraded idiots, whenever manifestations of any mental action can be educed, the feeling of right and wrong may be proved to exist.”

“With regard to this test,” says Dr. Russell Reynolds, in his work on “The Scientific Value of the Legal Tests of Insanity,” p. 34 (London, 1872), “I may say, and most emphatically, that it is utterly untrustworthy, because untrue to the obvious facts of Nature.”

In the learned treatise of Drs. Bucknill and Tuke on “Psychological Medicine,” p. 269 (4th Ed., London, 1879), the legal tests of responsibility are discussed, and the adherence of the courts to the right and wrong test is deplored as unfortunate, the true principle being stated to be “whether, in consequence of congenital



defect or acquired disease, *the power of self-control* is absent altogether, or is so far wanting as to render the individual irresponsible." It is observed by the authors: "As has again and again been shown, the unconsciousness of right and wrong is one thing, and the powerlessness through cerebral defect or disease to do right is another. To confound them in an asylum would have the effect of transferring a considerable number of the inmates thence to the treadmill or the gallows."

Dr. Peter Bryce, Superintendent of the Alabama Insane Hospital for more than a quarter century past, alluding to the moral and disciplinary treatment to which the insane inmates are subjected, observes: "They are dealt with in this institution, as far as it is practicable to do so, as rational beings; and it seldom happens that we meet with an insane person who can not be made to discern, to some feeble extent, his duties to himself and others, and his true relations to society." Sixteenth Annual Rep. Ala. Insane Hosp. (1876), p. 22; Biennial Rep. (1886), pp. 12-18.

Other distinguished writers on the medical jurisprudence of insanity have expressed like views, with comparative unanimity. And nowhere do we find the rule more emphatically condemned than by those who have the practical care and treatment of the insane in the various lunatic asylums of every civilized country. A notable instance is found in the following resolution unanimously passed at the annual meeting of the British Association of Medical Officers of Asylums and Hospitals for the Insane, held in London, July 14, 1864, where there were present fifty-four medical officers:

"*Resolved*, That so much of the legal test of the mental condition of an alleged criminal lunatic as renders him a responsible agent, because he knows the difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently in those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions." Judicial Aspects of Ins. (Ordronaux, 1877), 423-424.

These testimonials as to a scientific fact are recognized by intelligent men in the affairs of every day business, and are constantly acted on by juries. They can not be silently ignored by judges. Whether established or not, there is certainly respectable evidence tending to establish it, and this is all the courts can require.

Nor are the modern law writers silent in their disapproval of

the alleged test under discussion. It meets with the criticism or condemnation of the most respectable and advanced in thought among them, the tendency being to incorporate in the legal rule of responsibility "not only *the knowledge* of good and evil, but the *power to choose* the one, and refrain from the other." Browne's Med. Jur. of Insanity, § 13 *et seq.*, § 18; Ray's Med. Jur. §§ 16-19; Whart. & Stilles' Med. Jur., § 59; 1 Whart. Cr. Law (9th Ed.), §§ 33, 43, 45; 1 Bish. Cr. Law (7th. Ed.), § 386 *et seq.*; Judicial Aspects of Insanity (Ordronaux), 419; 1 Green. Ev., § 372; 1 Steph. Hist. Cr. Law, § 168; Amer. Law Rev., Vol. 4 (1869-70), 236 *et seq.*

The following practicable suggestion is made in the able treatise of Balfour Browne above alluded to: "In a case of alleged insanity, then," he says, "if the individual suffering from enfeeblement of intellect, delusion, or any other form of mental aberration, was looked upon as, to the extent of this delusion, under the influence of duress (the dire duress of disease), and in so far *incapacitated to choose* the good and eschew the evil, in so far, it seems to us," he continues, "would the requirements of the law be fulfilled; and in that way it would afford an opening, by the evidence of experts, for the proof of the amount of self-duress in each individual case, *and thus alone can the criterion of law and the criterion of the inductive science of medical psychology be made to coincide.*" Med. Jur. of Ins. (Browne), § 18.

This, in our judgment, is the practical solution of the difficulty before us, as it preserves to the courts and the juries, respectively, a harmonious field for the full assertion of their time honored functions.

So great, it may be added, are the embarrassments growing out of the old rule, as expounded by the judges in the House of English Lords, that, in March, 1874, a bill was brought before the House of Commons, supposed to have been drafted by the learned counsel for the Queen, Mr. Fitzjames Stephen, which introduced into the old rule the new element of an absence of the power of self-control, produced by diseases affecting the mind, and this proposed alteration of the law was cordially recommended by the late Chief Justice Cockburn, his only objection being that the principle was proposed to be limited to the case of homicide. —1 Whart. Cr. Law (9th Ed.), § 45, p. 66, *note* 1; Browne's Med. Jur. of Insan., § 10, *note* 1.

There are many well considered cases which support these views.

In the famous case of *Hadfield*, 27 How. St. Tr. 1282, s. c., 2 Lawson's Cr. Def. 201-215, who was indicted and tried for shooting the King, and who was defended by Mr. Erskine in an argument most able and eloquent, it clearly appeared that the accused understood the difference between right and wrong as applied to the particular act. Yet he labored under the delusion that he had constant intercourse with the Divine Creator; that the world was coming to an end, and that, like Christ, he must be sacrificed for its salvation. He was so much under the duress of the delusion that he "must be destroyed, but ought not to destroy himself," that he committed the act for the specific purpose of being arrested and executed. He was acquitted on being tried before Lord Kenyon, and, no one ever doubted, justly so.

The case of *United States v. Lawrence*, 4 Cr. C. C. Rep. 518, tried in 1835, presented another instance of delusion, the prisoner supposing himself to be the King of England and of the United States as an appendage of England, and that General Jackson, then President, stood in his way in the enjoyment of the right. Acting under the duress of this delusion, the accused assaulted the President by attempting to shoot him with a pistol. He was, in five minutes, acquitted by the jury on the ground of insanity.

The case of the *United States v. Guiteau*, 10 Fed. Rep. 161, s. c. 2 Lawson's Cr. Def. 162, is still fresh in contemporary recollection, and a mention of it can scarcely be omitted in the discussion of the subject of insanity. The accused was tried, sentenced, and executed for the assassination of James A. Garfield, then President of the United States, which occurred in July, 1881. The accused himself testified that he was impelled to commit the act of killing by inspiration from the Almighty, in order, as he declared, "to unite the two factions of the Republican party, and thereby save the government from going into the hands of the ex-rebels and their Northern allies." There was evidence of various symptoms of mental unsoundness, and some evidence tending to prove such an alleged delusion, but there was also evidence to the contrary, strongly supported by the most distinguished experts, and looking to the conclusion, that the accused entertained no such delusion, but that, being a very eccentric and immoral man, he acted from moral obliquity, the morbid love of notoriety, and with the expressed hope that the faction of the

Republican party, in whose interest he professed to act, would intervene to protect him. The case was tried before the United States District Court, for the District of Columbia, before Mr. Justice Cox, whose charge to the jury is replete with interest and learning. While he adopted the right and wrong test of insanity, he yet recognized the principle, that, if the accused in fact entertained an insane delusion, which was the product of the disease of insanity, and not of a malicious heart and vicious nature, and acted solely under the influence of such delusion, he could not be charged with entertaining a criminal intent. An insane delusion was defined to be "an unreasoning and incorrigible belief in the existence of facts, which are either impossible absolutely, or impossible under the circumstances of the individual," and no doubt the case was largely determined by the application of this definition by the jury. It must ever be a mere matter of speculation what influence may have been exerted upon them by the high personal and political significance of the deceased, as the Chief Magistrate of the Government, or other peculiar surroundings of a partisan nature. The case in its facts is so peculiar as scarcely to serve the purpose of a useful precedent in the future.

We note other adjudged cases, in this country, which support the modern rule for which we here contend, including one decided in England as far back as 1840, often referred to by the text writers. In *Rex v. Oxford*, 2 C. & P. 225, Lord Denman clearly had in mind this principle, when, after observing that one may commit a crime and not be responsible, he used this significant language: "If some *controlling disease* was in truth *the acting power within him*, which *he could not resist*, then he will not be responsible." The accused in that case acted under the duress of a delusion of an insane character.

In *State v. Felter*, 25 Iowa, 67, the capacity to distinguish between right and wrong was held not to be a safe test of criminal responsibility in all cases, and it was accordingly decided, that, if a person commit a homicide, knowing it to be wrong, but **do so** under the influence of an uncontrollable and irresistible impulse, arising not from natural passion, but from an insane condition of the mind, he is not criminally responsible. "If," said Chief Justice Dillon, "by the observation and concurrent testimony of medical men who make the study of insanity a specialty, it shall be definitely established to be true, that there is an unsound

condition of the mind, that is, a diseased condition of the mind, in which, though a person abstractly knows that a given act is wrong, he is yet, by an *insane impulse*, that is, an impulse proceeding from a diseased intellect, irresistibly driven to commit it—the law must modify its ancient doctrines and recognize the truth, and give to this condition, when it is satisfactorily shown to exist, its exculpatory effect.”

In *Hopps v. People*, 31 Ill. 385, which was an indictment for murder, the same rule was recognized in different words. It was there held, that if, at the time of the killing, the defendant was not of sound mind, but affected with insanity, and such disease was the *efficient cause* of the act, operating to create an uncontrollable impulse so as to deprive the accused of the power of volition in the matter, and he would not have done the act but for the existence of such condition of mind, he ought to be acquitted.

In *Bradley v. State*, 31 Ind. 492, a like modification of the old rule was announced, the court observing: “Men, under the influence of disease, may know the right, and yet be powerless to resist the wrong. The well known exhibition of cunning by persons admitted to be insane, in the perpetration of an illegal act, would seem to indicate comprehension of its evil nature and legal consequences, and yet the power of self-control being lost from disease, there can be no legal responsibility.”

In *Harris v. State*, 18 Tex. Ct. App. 287, s. c., 5 Amer. Cr. Rep. (Gibbons), 357, this rule was applied to the disease known as kleptomania, which was defined as a species of insanity producing an uncontrollable propensity to steal, and it was held, if clearly established by the evidence, to constitute a complete defense in a trial for theft.

*The State v. Pike*, 49 N. H. 399, was an indictment for murder, to which the plea of insanity was set up as a defense. It was held to be a question of fact for the jury to determine; (1) whether there was such a mental disease as dipsomania, which is an irresistible craving for alcoholic liquors, and (2) whether the act of killing was the product of such disease. One of the most instructive discussions on the law of insanity, which can be found in legal literature, is the learned opinion of Mr. Justice Doe in that case.—Lawson on Insanity, pp. 311-312; 2 Lawson's Cr. Def. 311 *et seq.*

This ruling was followed by the same court in *State v. Jones*,

50 N. H. 369, s. c., 9 Amer. Rep. 242, which was an indictment charging the defendant with murdering his wife. The evidence tended to show that the defendant was insane, and killed her under the delusive belief that she had been guilty of adultery with one French. The rule in *McNaghten's case* was entirely repudiated, both on the subject of the right and wrong test, and that of delusions, and it was held that the defendant should be acquitted if he was at the time afflicted with a disease of the mind of such character as to take away the capacity to entertain a criminal intent, and that there could be no criminal intent imputed, if, as matter of fact, the evidence showed that the killing was the offspring or product of such disease.

Numerous other cases could be cited bearing on this particular phase of the law, and supporting the above views with more or less clearness of statement. That some of these cases adopt the extreme view, and recognize moral insanity as a defense to crime, and others adopt a measure of proof for the establishment of insanity more liberal to the defendant than our own rule, can neither lessen their weight as authority, nor destroy the force of their logic. Many of them go further on each of these points than this court has done, and are, therefore, stronger authorities than they would otherwise be in support of our views.—*Kriel v. Com.*, 5 Bush. (Ky.) 362; *Smith v. Com.*, 1 Duv. (Ky.) 224; *Dejarnette v. Com.*, 75 Va. 867; *Coyle v. Com.*, 100 Penn. St. 573; *Cunningham v. State*, 56 Miss. 269; *Com. v. Rogers*, 7 Mete. 500; *State v. Johnson*, 40 Conn. 136; *Anderson v. State*, 43 Conn. 514, 525; *Buswell on Ins.*, § 439 *et seq.*; *State v. McWhorter*, 46 Iowa 88.

The law of Scotland is in accord with the English law on this subject, as might well be expected. The criminal Code of Germany, however, contains the following provision, which is said to have been the formulated result of a very able discussion both by the physicians and lawyers of that country: "There is no criminal act when the actor at the time of the offense is in a state of unconsciousness, or morbid disturbance of the mind, *through which the free determination of his will is excluded.*"—*Encyc. Brit.* (9th Ed.), Vol. 9, p. 112; citing *Crim. Code of Germany* (§ 51, R. G. B.).

The Code of France provides: "There can be no crime or offense if the accused was in a state of *madness* at the time of the act." For some time the French tribunals were inclined to

interpret this law in such a manner as to follow in substance the law of England. But that construction has been abandoned, and the modern view of the medical profession is now adopted in that country.

It is no satisfactory objection to say that the rule above announced by us is of difficult application. The rule in *McNaghten's case*, *supra*, is equally obnoxious to a like criticism. The difficulty does not lie in the rule, but is inherent in the subject of insanity itself. The practicable trouble is for the courts to determine in what particular cases the party on trial is to be transferred from the category of sane to that of insane criminals—where, in other words, the border line of punishability is adjudged to be passed. But, as has been said in reference to an every day fact of nature, no one can say where twilight ends or begins, but there is ample distinction nevertheless between *day* and *night*. We think we can safely rely in this matter upon the intelligence of our juries, guided by the testimony of men who have practically made a study of the disease of insanity; and enlightened by a conscientious desire, on the one hand, to enforce the criminal laws of the land, and on the other, not to deal harshly with any unfortunate victim of a diseased mind, acting without the light of reason, or the power of volition.

Several rulings of the court, including especially the one given *ex mero motu*, and the one numbered five, were in conflict with this view, and for these errors the judgment must be reversed. The charges requested by defendant were all objectionable on various grounds. Some of them were imperfect statements of the rules above announced; some were argumentative, and others were misleading by reason of ignoring one or more of the essentials of criminal irresponsibility, as explained in the foregoing opinion.

It is almost needless to add that where one does not act under the duress of a diseased mind, or insane delusion, but from motives of anger, revenge or other passion, he can not claim to be shielded from punishment for crime on the ground of insanity. Insanity proper, is more or less a mental derangement, coexisting often, it is true, with a disturbance of the emotions, affections and other moral powers. A mere moral, or emotional insanity, so-called, unconnected with disease of the mind, or irresistible impulse resulting from mere moral obliquity, or wicked propensities and habits, is not recognized as a defense to crime in our courts.—

1 Whar. Cr. Law (9th Ed.), § 46; *Boswell v. State*, 63 Ala. 307, 35 Amer. Rep. 20; *Ford v. State*, 71 Ala. 385.

The charges refused by the court raise the question as to how far one acting under the influence of an insane delusion is to be exempted from criminal accountability. The evidence tended to show that one of the defendants, Mrs. Nancy J. Parsons, acted under the influence of an insane delusion that the deceased, whom she assisted in killing, possessed supernatural power to afflict her with disease and to take her life by some "supernatural trick"; that by means of such power the deceased had caused defendant to be in bad health for a long time, and that she acted under the belief that she was in great danger of the loss of her life from the conduct of deceased operating by means of such supernatural power.

The rule in *McNaghten's case*, as decided by the English judges, and supposed to have been adopted by the court, is that the defense of insane delusion can be allowed to prevail in a criminal case only when the imaginary state of facts would, if real, justify or excuse the act; or, in the language of the English judges themselves, the defendant "must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real."—*Boswell's case*, 63 Ala. 307. It is apparent, from what we have said, that this rule can not be correct as applied to all cases of this nature, even limiting it as done by the English judges to cases where one "labors under partial delusion, and is not in other respects insane."—*McNaghten's case*, 10 Cl. & P. 200; s. c., 2 Lawson's Cr. Def. 150. It holds a partially insane person as responsible as if he were entirely sane, and it ignores the possibility of crime being committed under the duress of an insane delusion, operating upon a human mind, the integrity of which is destroyed or impaired by disease, except, perhaps, in cases where the imaginary state of facts, if real, would excuse or justify the act done under their influence.—Fields' Med. Leg. Guide, 101-104; Guy & F. on Forensic Med. 220. If the rule declared by the English judges be correct, it necessarily follows that the only possible instance of excusable homicide in cases of delusional insanity would be, where the delusion, if real, would have been such as to create, in the mind of a reasonable man, a just apprehension of imminent peril to life or limb. The personal fear, or timid cowardice of the insane man, although created by disease acting



through a prostrated nervous organization, would not excuse undue precipitation of action on his part. Nothing would justify assailing his supposed adversary except an overt act, or demonstration on the part of the latter, such as, if the imaginary facts were real, would under like circumstances, have justified a man perfectly sane in shooting or killing. If he dare fail to reason, on the supposed facts embodied in the delusion, as perfectly as a sane man could do on a like state of realities, he receives no mercy at the hands of the law. It exacts of him the last pound of flesh. It would follow, also, under this rule, that the partially insane man, afflicted with delusions, would no more be excusable than a sane man would be, if, perchance, it was by his fault the difficulty was provoked, whether by word or deed; or, if, in fine, he may have been so negligent as not to have declined combat when he could do so safely, without increasing his peril of life or limb. If this has been the law heretofore, it is time it should be so no longer. It is not only opposed to the known facts of modern medical science, but it is a hard and unjust rule to be applied to the unfortunate and providential victims of disease. It seems to be little less than inhumane, and its strict enforcement would probably transfer a large percentage of the inmates of our Insane Hospital from that institution to hard labor in the mines, or the penitentiary. Its fallacy consists in the assumption that no other phase of delusion, proceeding from a diseased brain, can so destroy the volition of an insane person as to render him powerless to do what he knows to be right, or to avoid doing what he may know to be wrong. This inquiry, as we have said, and here repeat, is a question of fact for the determination of the jury in each particular case. It is not a matter of law to be decided by the courts. We think it sufficient if the insane delusion—by which we mean the delusion proceeding from a *diseased mind*—sincerely exists at the time of committing the alleged crime, and the defendant believing it to be real, is so influenced by it as either to render him incapable of perceiving the true nature and quality of the act done, by reason of the depravation of the reasoning faculty, or so subverts his will as to destroy his free agency by rendering him powerless to resist by reason of *the duress of the disease*. In such a case, in other words, there must exist either one of two conditions: (1), Such mental defect as to render the defendant unable to distinguish between right and wrong in relation to the particular act; or (2), the over-

mastering of defendant's will in consequence of the insane delusion under the influence of which he acts, produced by disease of the mind or brain.—*Rex v. Hadfield*, 37 How. St. Tr. 1282, s. c., 2 Lawson's Cr. Def. 201; *Roberts v. State*, 3 Ga. 310; *Com. v. Rogers*, 7 Mete. 500; *State v. Windsor*, 5 Harr. 512; Buswell on Insan. §§ 434 and 440; Amer. Law Review, Vol. 4 (1869-70) pp. 236-252.

In conclusion of this branch of the subject, that we may not be misunderstood, we think it follows very clearly from what we have said, that the inquiries to be submitted to the jury then, in every criminal trial where the defense of insanity is interposed, are these:

1. Was the defendant at the time of the commission of the alleged crime, as matter of fact, afflicted with a *disease of the mind*, so as to be either idiotic, or otherwise insane?

2. If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible.

3. If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur:

(1.) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.

(2.) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.

The rule announced in *Boswell's case*, 63 Ala. 308, *supra*, as stated in the fourth head note, is in conflict with the foregoing conclusions, and to that extent is declared incorrect, and is not supported by the opinion in that case otherwise than by *dictum*.

We adhere, however, to the rule declared by this court in *Boswell's case*, *supra*, and followed in *Ford's case*, 71 Ala. 385, holding, that when insanity is set up as a defense in a criminal case, it must be established to the satisfaction of the jury, by a preponderance of the evidence; and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal.

There was no error in overruling the objection taken by the defendants to the copy of the venire, or list of jurors, served on them. The act approved February 17, 1885, (Acts 1884-85, pp.

181, 185, Sec. 10), regulating the organization of juries, applies to this case, and provides that "the names of the jurors *so drawn*," in accordance with section 10 of the act, together with the panel, of thirty-six jurors provided for by section 9, "shall constitute *the venire*," from which the jurors to try capital cases shall be selected.—Acts 1884-85, pp. 185-186. The rule on this subject declared in *Posey's case*, 73 Ala. 490, and *Shelton's case*, *Ib.* 5, has no application under this act. These cases construe section 4872 of the Code, which contains different language from the law here construed.

Under the rule announced in *Ford v. State*, 71 Ala. 385, 397, and authorities there cited, there was no error in excluding the proposed statement of Mrs. Nail. This testimony was defective in not being preceded more fully by the facts and circumstances upon which the opinion of the witness as to the sanity of the accused was predicated, the witness not being an expert.—Rogers on Expert Test. § 61.

The other rulings of the court need not be considered by us.

The judgment is reversed and the cause remanded. In the meanwhile the prisoners will be held in custody until discharged by due process of law.

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*b. Intoxication.*

*Pigman v. State*, 14 Ohio Rep. 555. (1846.)

This is a writ of error to the court of common pleas of Marion county.

The plaintiff in error was indicted for uttering, publishing, bartering, and disposing of counterfeit bank bills. The proof was the passing of a counterfeit bank bill of twenty dollars. A verdict of guilty was found by the jury, and the plaintiff was sentenced to four years' imprisonment in the penitentiary.

A number of errors are assigned. But the one chiefly relied upon, or at all available, as disclosed in the bill of exceptions, is, that the court ruled out evidence offered by the accused, to show

that he was drunk at the time he passed the bill, and therefore did not know what he was doing, or that the bill was counterfeit.

No argument was submitted for the plaintiff.

READ, J.:

Drunkenness is no excuse for crime; yet, in that class of crimes and offenses which depend upon guilty knowledge, or the coolness and deliberation with which they shall have been perpetrated, to constitute their commission, or fix the degree of guilt, it should be submitted to the consideration of the jury. If this act is of that nature that the law requires it should be done with guilty knowledge, or the degree of guilt depends upon the calm and deliberate state of the mind at the time of the commission of the act, it is proper to show any state or condition of the person that is adverse to the proper exercise of the mind, and the undisturbed possession of the faculties. The older writers regarded drunkenness as an aggravation of the offense, and excluded it for any purpose. It is a high crime against one's self, and offensive to society and good morals; yet every man knows that acts may be committed in a fit of intoxication which would be abhorred in sober moments. And it seems strange that any one should ever have imagined that a person who committed an act from the effect of drink, which he would not have done if sober, is worse than the man who commits it from sober and deliberate intent. The law regards an act done in sudden heat, in a moment of frenzy, when passion has dethroned reason, as less criminal than the same act when performed in the cool and undisturbed possession of all the faculties. There is nothing the law so much abhors as the cool, deliberate, and settled purpose to do mischief. That is the quality of a demon; whilst that which is done on great excitement, as when the mind is broken up by poison or intoxication, although, to be punished, may, to some extent, be softened and set down to the infirmities of human nature. Hence—not regarding it as an aggravation—drunkenness, as anything else showing the state of mind or degree of knowledge, should go to the jury. Upon this principle, in modern cases, it has been permitted to be shown that the accused was drunk when he perpetrated the crime of killing, to rebut the idea that it was done in a cool and deliberate state of the mind, necessary to constitute murder in the first degree. The principle is undoubtedly right. So, on a charge of

passing counterfeit money; if the person was so drunk that he actually did not know that he had passed a bill that was counterfeit, he is not guilty. It oftentimes requires much skill to detect a counterfeit. The crime of passing counterfeit money, consists of knowingly passing it. To rebut that knowledge, or to enable the jury to judge rightly of the matter, it is competent for the person charged to show that he was drunk at the time he passed the bill. It is a circumstance, among others, entitled to its just weight.

Judgment reversed, and cause remanded.

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*McCook v. State, 91 Ga., 740. (1893.)*

LUMPKIN, J.:

It is the settled policy of our law that drunkenness shall not be an excuse for crime. The fact of drunkenness may sometimes be proved to explain motives or to illustrate intention, but in only one instance will it serve as an absolute excuse for the commission of an act which the law makes penal, and that is where it has been "occasioned by the fraud, artifice, or contrivance of other person or persons, *for the purpose of having a crime perpetrated.*" In that event, the person or persons causing the drunkenness for such purpose shall be considered and punished as a principal or principals in the commission of the offense. Code, § 4301. If a person already drunk is procured by another to commit a crime, he can not set up the fact of drunkenness as an excuse for his act. If this were allowed, it would, in a large number of cases, be difficult, if not altogether impracticable, to make a drunken man responsible for his crimes at all; and accordingly, we think it safer and wiser to adhere closely to the plain meaning of the section cited. This is not violative of the rule requiring criminal statutes to be construed strictly. The general rule is that all men, drunk or sober, are criminally responsible for their acts. One exception, and one only, is made by the section above mentioned. The language of that section is not ambiguous or uncertain, and we simply give it force as expressed, there being no occasion for construction, strict or otherwise.

## CHAPTER III.

### THE OVERT ACT.

#### 1. ATTEMPTS AND CONSPIRACY.

*State v. Wilson, 30 Conn., 500. (1862.)*

On the trial to the jury the attorney for the state offered evidence to prove that, on the 4th day of September, 1861, there was a large number of persons congregated at the railroad station in the city of Hartford, on the occasion of the funeral of General Lyon, that the prisoners were there, and that while the attention of the persons present was engaged in the ceremonies going on, Marsh, one of the prisoners, thrust his hand into the pocket of an elderly lady, who was engaged in observing what was passing; and that Wilson, the other prisoner, was present, aiding and abetting Marsh. He did not however offer any evidence to prove the name of the woman, nor attempt to prove that she had any money or other thing of value in her pocket. The counsel for the prisoners thereupon claimed that, in the absence of any evidence to show the name of the person into whose pocket Marsh had thrust his hand, or that she had in her pocket anything of value, no offense known to the laws of this state had been committed by either of the prisoners, and that they should be acquitted by the jury; and they requested the court so to charge the jury. The court did not so instruct the jury, but charged them that, if they should find that the prisoners had combined to obtain possession of the money of the people present on that occasion by picking their pockets and to divide their ill gotten gains between them, and that in pursuance of this object the said Marsh thrust his hand into the pocket of a woman whose name was unknown, with an intent in so doing to steal the money or other property belonging to her if any should be found in her personal possession, and that the said Wilson was present aiding and abetting him, their verdict should be that they were both guilty of the crime charged in the information.

The jury having returned a verdict of guilty against the defend-

ants, they moved for a new trial for error in the charge of the court and in the refusal to charge as they requested. They also moved in arrest of judgment for the insufficiency of the information. The latter motion was reserved with the other for the advice of this court.

BUTLER, J.:

We are all satisfied, upon a careful consideration of the case, that this verdict and judgment should stand.

It may well be doubted whether the first count of the information is sufficient. A mere intent to commit a crime, which exists in the mind only, and has not induced and characterized an act, is not a punishable offense; and therefore an "attempt" necessarily includes the intent, and also "an act of endeavor" adapted and intended to effectuate the purpose; and both must be specifically alleged and proved. Although it has been said by one of the elementary writers cited, that an attempt need not be set forth with as much exactness as is required in an indictment for the commission of the offense, it is not true as a general proposition, nor applicable to a case like this. In the first count the intent is not expressly alleged. The question was considered in some of the old cases whether the word "intending," in the introductory part of an indictment, was a sufficient allegation of the intent, in cases where the intent was an essential ingredient of the crime, (as it always is when the act of attempt is otherwise innocent or a mere trespass) and it was holden that it was. *Rex v. Phillips*, 6 East., 464, and cases cited. But we are not aware that it has ever been holden that the allegation may be wholly omitted in an information for an attempt; nor of any good reason why it may not and should not be expressly alleged in all such cases. If it be said that the words "attempt to steal" imply it sufficiently, the conclusive answer is, that they equally imply an overt act of endeavor, for that is equally an element of the attempt; and if either element of the offense may be left to implication, both may be, and a general averment of an attempt to steal, or to rob, or other attempt, would in such cases be sufficient. This can not be permitted in justice to the accused, nor consistently with the rule always substantially adhered to, that the want of a direct allegation of anything material in the description of the nature, substance or manner of the offense, can not be supplied by intendment

or implication. 2 Hawkins P. C., Chap. 25, § 60. *Rex v. Higgins*, 2 East, 20. *Rex v. Phillips*, 6 East, 464.

Nor is the averment of the overt act sufficient. It is essential that the act of endeavor should be intrinsically adapted to effectuate the purpose; and in order that the court and the accused may see that the act is so adapted, it should be specifically stated. Here the averment of the act, "by picking her pocket," is uncertain and equivocal. What is meant by the words, "by picking her pocket," in the connection in which they are used? Do they state clearly a specific act of endeavor? If the pocket was in fact picked, the offense intended was committed, and merged the offense charged; and it is not clear that the expressions used are not open to that construction. If they are equivalent to the words "by attempting to pick her pocket," they are still uncertain. By what act? What did the accused do by way of attempt? Pockets are picked by cutting them off and removing them, by cutting them open so as to expose their contents, and by thrusting the hands into them. So various other acts are done by the intended thief, or his confederates, to divert or engross the attention of the victim; such as gathering around him in a crowd, or jostling him, or creating in some other way confusion or alarm, while the pocket or its contents are secured. If under a general averment of "attempting to pick the pocket" any direct attempt to remove, open it, or grasp its contents, and any auxiliary act calculated to engross or divert the attention of the owner may be proved, injustice may be done to the accused; as well because no preliminary question can be made respecting the adaptation of the act, as because the accused will not be able to anticipate, if innocent, the precise act which he is called upon to explain or disprove, or have the benefit of a definite record in the event of a subsequent prosecution.

The second count is not open to these objections. In that the act of endeavor—"by thrusting the hand into the pocket"—and the intent, are specifically charged; and that count in those particulars is clearly sufficient.

But it is further claimed that there must be present ability to perpetrate the offense; that if, in this case, the pocket was empty, there could be no such ability; and that the second count of the information does not allege that there was in fact property in the pocket.

There must undoubtedly be present ability to perpetrate the



offense. The person must be of legal age, *compos mentis*, and in a situation to effect the purpose, directly or by the agency of others. But it is not true that the thing intended to be taken must be where the attempting thief supposes it to be, or that there must be in fact property where he supposes there is. It is sufficient if he supposes there is property in the pocket, trunk, or other receptacle, and attempts, by some act adapted to the purpose, to obtain it feloniously.

Thus a conviction has been sustained for an attempt against one who broke open a trunk, supposing there was property in it and intending to steal it, when in fact there was none; and against one who administered noxious drugs to a woman, supposing her pregnant and intending to produce abortion, when she was not pregnant; and against a person for thrusting his hand into the pocket of another, supposing there was property in it, and with intent to steal, when the fact that there was property in it was not alleged or proved on the trial. *Commonwealth v. McDonald*, 5 Cush., 365. In that case it is true, the indictment was framed upon a special statute but that statute was in affirmance of the common law, as in force and recognized in this state; and the same principles were involved. A similar case has been decided in Pennsylvania (*Rogers v. Commonwealth*, 5 Serg. & Rawle, 463), and a case differing as to the facts, but involving like principles upon a like statute in New York. *The People v. Bush*, 4 Hill, 133. Indeed, upon principle, it would be a novel and startling proposition, that a known pickpocket might pass around in a crowd, in full view of a policeman, and even in the room of a police station, and thrust his hands into the pockets of those present with intent to steal, and yet not be liable to arrest or punishment, until the policeman had first ascertained that there was in fact money or valuables in some one of the pockets on which the thief had experimented. The statement of such a proposition is a sufficient refutation of it; and the only safe rule is, that the attempt is complete and punishable, when an act is done with intent to commit the crime, which it adapted to the perpetration of it, whether the purpose fails by reason of interruption, or because there was nothing in the pocket, or for other extrinsic cause.

There is a class of cases, some of which have been cited, apparently similar to those stated, but clearly distinguishable from them,

where a different decision has been made. Thus where, with intent to defraud, a writing was falsely made which could not by legal possibility defraud any one, it was holden that no offense had been committed, because a person could not be legally presumed to intend that which was legally impossible. And where an attempt was made to poison with an article believed to be poisonous, but which was in fact innoxious, and where an attempt was made to shoot a person with a pistol which was not in fact loaded, it was holden that no offense had been committed, because no act had been done which was intrinsically adapted to the then present successful perpetration of the crime. 1 Bishop Crim. Law, §§ 517, 518. Here the perpetration of the crime was legally possible, the persons in a situation to do it, the intent clear, and the act adapted to the successful perpetration of it; and whether there was or was not property in the pocket was an extrinsic fact, not essential to constitute the attempt, and therefore one which it was not necessary to allege.

It appears from the motion for a new trial, that the counsel asked the court to charge that without proof of the name of the woman, and the fact that there was property in her pocket, the prisoners could not be convicted.

The prisoners were not entitled to such instruction. That which, from the nature of the case, can not be alleged, need not be; and it is of frequent occurrence that the name of the person injured is unknown. Justice must not fail nor the community go unprotected for such cause. If the name is unknown, and it is so averred, it need not be proved; and this is not a serious cause of complaint by the prisoner; for if he can show, or it appears on the trial, that the name was in fact known, it is held that he is entitled to an acquittal. Arch. Cr. Pl., 33. And if the name is and remains unknown, it is too much for him to ask to go unpunished for that reason. Nor was it necessary to prove that there was property in the pocket. The offense as we have seen was complete, however that might be; and therefore that fact was immaterial, and the averment surplusage.

We do not perceive any error in the charge of the judge. A conspiracy exists when two or more combine to do an unlawful act. The essence of the offense is the criminal combination, and no overt act is necessary to constitute it. But when, in pursuance of the combination, they attempt to do the particular act for which

they combined, another offense is committed, viz., an attempt, which the former does not merge. The latter offense was alleged in the information and proved on the trial. The former was only important upon the question of intent, and the guilt of the prisoner who did not actually commit the principal act of attempt. The court did not tell the jury that if the prisoners conspired to rob the citizens of the state generally they might convict them; but that if they found such combination, and also found that they had attempted to carry it into effect; if Marsh had, pursuant to that object, thrust his hand into the pocket of the lady, and Wilson was aiding and abetting, the verdict should be that they were guilty of the crime charged in the information. The import of the charge is, that if both had conspired to do that or similar acts, and in pursuance of such combination they attempted to do the particular act charged, they were guilty of that attempt. Thus construed it was correct and appropriate.

A new trial is not advised.

In this opinion the other judges concurred.

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## 2. SOLICITATIONS TO COMMIT CRIME.

*Commonwealth v. Randolph, 146 Pa. St., 83. (1892.)*

### PER CURIAM:

The appellant was convicted in the court below upon an indictment in the first count of which it was charged that she, "Sarah A. McGinty, alias Sarah A. Randolph, \* \* \* unlawfully, wickedly, and maliciously did solicit and invite one Samuel Kissinger, then and there being, and by the offer and promise of payment to said Samuel Kissinger of a large sum of money, to wit, one thousand dollars, which to him, the said Samuel Kissinger, she, the said Sarah A. McGinty, alias Sarah A. Randolph, then and there did propose, offer, promise, and agree to pay, did incite and encourage him, the said Samuel Kissinger, one William S. Foltz, a citizen of said county, in the peace of said commonwealth, feloniously to kill, murder, and slay, contrary to the form of the act of general assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania." Upon the trial below, the defendant moved to quash the indictment upon

the ground that "the said indictment does not charge in any count thereof any offense, either at common law or by statute." The court below refused to quash the indictment, and this ruling, with the refusal of the court to arrest the judgment, is assigned as error.

It may be conceded that there is no statute which meets this case, and if the crime charged is not an offense at common law, the judgment must be reversed.

What is a common law offense? We endeavored to answer this question in *Commonwealth v. McHale*, 97 Pa., 397, 410, in which we held that offenses against the purity and fairness of elections were crimes at common law, and indictable as such. We there said: "We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is, not whether precedents can be found in the books, but whether they injuriously affect the public police and economy." Tested by this rule, we have no doubt that the solicitation to commit murder, accompanied by the offer of money for that purpose, is an offense at common law.

It may be conceded that the mere intent to commit a crime, where such intent is undisclosed and nothing done in pursuance of it, is not the subject of an indictment. But there was something more than an undisclosed intent in this case. There was the direct solicitation to commit a murder, and an offer of money as a reward for its commission. This was an act done, a step in the direction of the crime; and, had the act been perpetrated, the defendant would have been liable to punishment as an accessory to the murder. It needs no argument to show that such an act affects the public police and economy in a serious manner.

Authorities in this state are very meager. *Smith v. Commonwealth*, 54 Pa., 209, decided that solicitation to commit fornication and adultery is not indictable. But fornication and adultery are mere misdemeanors by our law, whereas murder is a capital felony. *Stabler v. Commonwealth*, 95 Pa., 318, decided that the mere delivery of poison to a person, and soliciting him to place it in the spring of a certain party, is not "an attempt to administer poison," within the meaning of the eighty-second section of the act of March 31, 1860, P. L. 403. In that case, however, the sixth count of the indictment charged that the defendant did "falsely and wickedly solicit and invite one John Neyer, a servant

of the said Richard S. Waring to administer a certain poison and noxious and dangerous substance, commonly called Paris green, to the said Richard F. Waring, and divers other persons whose names are to the said inquest unknown, of the family of the said Richard F. Waring," etc. The defendant was convicted upon this count, and, while the judgment was reversed upon the first count, charging "an attempt to administer poison," we sustained the conviction upon the sixth count, Mercur, J., saying: "The conduct of the plaintiff in error, as testified to by the witness, undoubtedly shows an offense for which an indictment will lie without any further act having been committed. He was rightly convicted, therefore, on the sixth count."

The authorities in England are very full upon this point. The leading case is *Rex v. Higgins*, 2 East, 5. It is very similar to the case at bar, and it was squarely held that solicitation to commit a felony is a misdemeanor and indictable at common law. In that case it was said by Lord Kenyon, C. J.: "But it is argued that a mere intent to commit evil is not indictable without an act done; but is there not an act done, when it is charged that the defendant solicited another to commit a felony? The solicitation is an act; and the answer given at the bar is decisive that it would be sufficient to constitute an overt act of high treason." We are not unmindful of the criticism of this case by Chief Justice Woodward, in *Smith v. Commonwealth*, *supra*, but we do not think it affects the authority of that case. The point involved in *Rex v. Higgins* was not before the court in *Smith v. Commonwealth*, and could not have been and was not decided. It is true, this is made a statutory offense by statute 24 and 25 Vict.; but, as is said by Mr. Russell in his work on Crimes, Vol. I., p. 967, in commenting on this act: "As all the crimes specified in this clause appear to be misdemeanors at common law, the effect of this clause is merely to alter the punishment of them." In other words, that statute is merely declaratory of the common law.

Our best text books sustain the doctrine of *Rex v. Higgins*. "If the crime solicited to be committed be not perpetrated, then the adviser can only be indicted for a misdemeanor:" 1 Chit. Crim. L., 264. See, also, 1 Archb. Crim. Pr. & Pl., 19, and 1 Bish. Crim. L., § 768, where the learned author says: "The law as adjudged holds, and has held from the beginning in all this class of cases, an indictment sufficient which simply charges that the defendant,

at the time and place mentioned, falsely, wickedly, and unlawfully did solicit and incite a person named to commit the substantive offense, without any further specification of overt acts. It is vain, then, to say that mere solicitation, the mere entire thing which need be averred against a defendant as the ground for his conviction, is no offense."

We are of opinion the appellant was properly convicted, and the judgment is

Affirmed.

## CHAPTER IV.

### PARTIES TO CRIMES.

#### 1. PRINCIPALS.

*Doan v. State, 26 Ind., 495. (1866.)*

RAY, J.:

The indictment in this case charged the appellant with unlawfully, and burglariously, &c., breaking and entering, in the night time, into the storehouse of Samuel P. Frost and John C. Valentine, partners, doing business under the firm name of Frost & Valentine, with the felonious intent to steal, take and carry away the personal goods, etc., of said Samuel P. Frost and John C. Valentine.

The proof on the trial was, that while two other persons broke and entered the storehouse, the appellant did not break or enter, but acting in concert with the other two, remained outside watching, and ready and near enough to render them assistance, in case it might be required.

It is objected that the appellant was not charged as an aider and abetter, but as a principal. This was correct. At common law it was not required, in order to constitute one a principal in an offense, that the party charged should have been an eye witness of the transaction, or within hearing; it was sufficient that he had knowledge of the crime, and watched near enough and ready to assist those actually engaged, if required. That made a presence aiding and abetting, and constituted him a principal in the second degree, and he could be charged and convicted as a principal. Indeed, it was ruled in the case of *Rex v. Winifred et al.*, 1 Leach, 515, that where a person was indicted as an accessory before the fact, he could not be convicted of that charge upon evidence proving him to have been present aiding and abetting; the distinction between a principal in the second degree and an accessory before the fact being the presence of the former for the purpose of aiding, if required, those who actually commit the offense. That presence renders him who would otherwise have

been but an accessory before the fact, a principal in the second degree.

"The law, however," says Archbold, "recognizes no difference between the offense of the principal in the first degree, and of the principal in the second; both are equally guilty, and so immaterial is the distinction considered in practice, that if a man be indicted as principal in the first degree, proof that he was present aiding and abetting another in committing the offense, although his was not the hand which actually did it, will support the indictment, and, on the other hand, if he be indicted as principal in the second degree, proof that he was not only present but committed the offense with his own hand will support the indictment. So where an offense is punishable by a statute which makes no mention of principal in the second degree, such principals are within the meaning of the statute as much as the parties who actually committed the offense." 1 Arch. Crim. Prac. and Pl., p. 13.

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## 2. ACCESSORIES.

### a. *Accessory before the Fact and Principal and Agent.*

*People v. Adams*, 3 Denio (N. Y.), 190. (1846.)

Error to the New York general sessions. The defendant in error and one R. R. Seymour were indicted in the sessions for an offense against the statute (2 R. S. 677, § 53) for obtaining money and property by false pretences. The indictment contained seven counts, the first five, which are substantially alike, each set forth that the defendants intending to cheat and defraud Ferdinand Suydam and four other persons named, composing the firm of Suydam, Sage & Co. of the city of New York, commission merchants, on &c. *at the first ward of the city of New York in the city and county of New York*, did feloniously &c. falsely pretend and represent to those persons that the defendant Seymour had received of the defendant Adams a very large quantity of pork and lard, in good order, for and irrevocably subject to the order of said firm, and did then and there exhibit and deliver to the said firm a paper writing in the form of a receipt, signed by Seymour, which is set out. The paper is a forwarder's receipt dated at Chillicothe, January 11th, 1844, by which Seymour



acknowledges that he has received from Adams several thousand barrels of pork and lard, which is particularly described, for and irrevocably subject to the order of Suydam, Sage & Co., which he agrees to forward and deliver to them in the city of New York, they paying charges &c., and that they (S., S. & Co.) are to hold the property for sale on commission and to have a lien thereon for certain drafts drawn against it amounting to \$28,160, and for their general balance against the consignor. The count alleges that S., S. & Co. believing the said false pretences and being deceived thereby, were induced to and did accept in writing five drafts drawn by Adams on them for the aggregate amount mentioned in the receipt, which drafts are set forth; and that the defendants did "then and there" by means of such false pretences receive and obtain from S., S. & Co. the said acceptances, which the firm subsequently paid in full. It then negatives the pretences, averring that no such property was received by Seymour, that the receipt was fictitious and the statements therein utterly untrue, and that the defendants knew it. And so the jurors &c. say that the defendants on &c., *at &c.*, feloniously &c. did obtain the acceptances, and afterwards, on &c. the money payable upon them, with intent to cheat and defraud S., S. & Co. of the same, against the form of the statute &c. The two other counts are in a similar form, the receipt being for other property, accompanied by drafts for \$12,200.

Adams appeared in person and put in a plea, by which, after protesting that he is not guilty of the offenses charged in the indictment, nevertheless says "that he, the said defendant, was born in Ross county in the state of Ohio, of parents residing in and then being citizens of the state of Ohio, and from the time of his birth until the time of the exhibiting of this plea and for and during all the intermediate times he was and has been and still is a resident of, and in the state of Ohio; that at the said several times when the supposed offenses set forth in the several counts of the said indictment were, as therein alleged, committed, he was not, nor was he at any time prior thereto in the said city, county or state of New York; that the said several writings called receipts and drafts, set forth in the said indictment, were all drawn, signed and made in the said county of Ross, and whilst he the said Adams was resident therein; and that the said several receipts and drafts were by the said Adams presented

in the city of New York to the said persons so using the name, style and firm of Suydam, Sage & Co., *through the instrumentality of innocent agents employed by the said Adams*, whilst he, the said Adams, was and continued to be such resident of and personally within the said county of Ross in the state of Ohio, aforesaid, and were in the said city of New York presented to the said persons so using the name and firm of Suydam, Sage & Co., by the said Adams, through such innocent agents, and the said persons so using the name &c. then and there relying on the truth of the same were deceived and defrauded thereby; and the said several supposed offenses in the said several counts of the said indictment set forth were committed by him the said Adams in the said city and county of New York, by his causing and procuring the same to be done therein as aforesaid, while he the said Adams was in the said county of Ross, in the state of Ohio aforesaid; wherefore he the said Adams ought not to be criminally questioned or proceeded against in the state of New York for the said acts and offenses so done by him and caused and procured to be done by him as aforesaid while he was so resident and being in the said county of Ross;" concluding with a verification.

The district attorney demurred to the plea, and the defendant joined in demurrer. The general sessions gave judgment against the people and discharged the defendant, and the district attorney in the name of the people brought error to this court.

*By the Court, BEARDSLEY, J.:*

The intent to cheat and defraud, and the falsity of the pretences, as alleged in the indictment, are virtually conceded, for they are not denied by the plea. And the acts alleged to be criminal are expressly admitted to have been done and committed by the defendant in the city of New York, through the instrumentality of innocent agents, the defendant at that time being in the state of Ohio. No question was made on the argument, as to the form of the indictment or the plea; and the only point to be decided is whether here was an offense committed by the defendant "within the boundaries of this state." (2 R. S. 697, § 1.) If so, he may be tried and punished here; but if not, he is entitled to an acquittal, however infamous the fraudulent transaction to which he was a party may have been.

The crime charged in this indictment is a statute offense. Suy-

dam, Sage & Co. were induced by false and fraudulent pretences to sign certain written instruments, and to part with large sums of money. The fraud may have originated and been concocted elsewhere, but it became mature and took effect in the city of New York, for there the false pretences were used with success, the signatures and money of the persons defrauded being obtained at that place. The crime was therefore committed in the city of New York and not elsewhere. (2 R. S. 677, § 53; 1 Chit. Cr. Law, 4th Amer. ed., 191; *Rex v. Buttery*, mentioned by Chief Justice Abbott in *The King v. Burdett*, 4 B. & A., 95.) And of this crime, thus committed within the limits of this state, taking the facts charged and admitted to be true, the defendant, in my opinion, was plainly guilty, although at the time of its perpetration he was out of this state and within the limits of the state of Ohio. The intent to cheat was his; the fraudulent contrivance was his; and by agents, acting within this state, for him and under his authority and guidance, themselves innocent of all fraud, were the false pretences used and the crime fully consummated. He and he alone was therefore the guilty party.

This conclusion is certainly sound in morals and reason, and it should be so in law. The immediate actors in effecting the fraud were entirely guiltless: they were but instruments in the hands of the defendant, and wholly unconscious of the part they were made to perform in his guilty plot. A great fraud was thus perpetrated in this state and maimed or impotent indeed must our law be, if the contriver of the mischief, by whose efforts alone the cheat was effected, can escape punishment on the ground that he was out of the state when his fraudulent machinations were concocted, and when they took effect within it

Personal presence, at the place where a crime was perpetrated, is not indispensable to make one a principal offender in its commission. Thus, where a gun is fired from the land which kills a man at sea, the offence must be tried by the admiralty and not by the common law courts; for the crime is committed where the death occurs, and not at the place from whence the cause of the death proceeds. And on the same principle an offence committed by firing a shot from one county which takes effect in another, must be tried in the latter, for there the crime was committed. (1 Chit. Cr. Law, 155, 191; *United States v. Davis*, 2 Sum. 485.) In such cases the offender is an immediate actor in the perpetration of the

crime, although not personally present at the place where the law adjudges it to be committed. He is there, however, by the instrument used to effect his purpose, and which the law holds sufficient to make him personally responsible at that place for the act done there.

But crimes may be perpetrated through the instrumentality of living agents in the absence of the principal, and our law books are full of such cases. Where poison is knowingly sent to be administered as medicine, by attendants who are ignorant that it is poison, and death ensues, the person who thus procures the poison to be taken is guilty of murder. So where a child without discretion, an idiot or a madman, is induced by a third person to do a felonious act, the instigator alone is guilty, and although not present at the perpetration of the crime, he is a principal felon. (*Foster's Cr. L.* 349; 1 *Hale's P. C.* 617; 1 *Ch. C. L.* 191; 1 *Curw. Hawk. P. C.* 92; *Regina v. Michael*, 9 *C. & P.* 356; *Commonwealth v. Hill*, 11 *Mass.* 136; *Stephens' Cr. L.* 7, 141.) This is on the common law principle, *qui facit per alium, facit per se*, which according to the late Chief Justice Hosmer of Connecticut, "is of universal application, both in criminal and civil cases." (*Barkhamsted v. Parsons*, 3 *Conn.* 8.) In misdemeanors and in civil transactions the remark is undoubtedly correct, as it also is in felonies where the agent is himself innocent. But where the agent is a guilty actor in the commission of the felony, the law makes him the principal offender, and the one by whom he was employed or instigated, is, if absent, but an accessory before the fact. With this qualification, what was said by the late learned chief justice is believed to be strictly correct.

That such is the rule where both principal and agent, at the time when the crime was perpetrated, were in the same state, although in different counties, was not denied on the argument, nor does it admit of a question. It was however urged, that the rule was otherwise where they were in different states and consequently under the immediate authority and jurisdiction of different systems of law. But this difference in matter of fact lays no foundation for a difference in principle. We were not referred to, nor have I found an adjudged case, or the dictum of an elementary writer, which gives the least countenance to it. On the contrary, it has been repeatedly overruled and disregarded by judicial tribunals of the most exalted character for learning and wisdom.

The case of *The King v. Brisac and Scott*, (4 East, 164) is directly in point. It was an information against the captain and purser of a British man of war, for a conspiracy to cheat the crown by means of false vouchers. The trial was in the county of Middlesex, and it appeared that "all the acts in which either of the defendants *immediately* took a part were done by them either on the high seas at Brassa Sound, or at Lerwick in the Isle of Shetland. The only acts proved to be done in Middlesex, were those which were done by them *mediately*, through the intervention of *innocent* persons." Upon this it was objected that "all the acts of the defendants themselves which constituted the offence of conspiracy were committed out of the jurisdiction of the common law." Grose, J., delivered the opinion of the court on this point, which was that the acts done by the agents of the defendants in Middlesex were their acts done in that county. "I say," said he, "it was *their* acts, done by them both; for the persons who innocently delivered the vouchers were mere instruments in their hands for that purpose; the crime of presenting these vouchers was exclusively *their* own, as the crime of administering poison through the medium of a person ignorant of its quality would be the crime of the person procuring it to be administered."

*The King v. Johnson* (6 East, 583, 7 *id.* 65) was determined on the same principle. The defendant was indicted in Middlesex in England, for procuring a libel to be published in that county, he being when it was procured to be so published and at the time of its publication, as well as when he wrote it, in Ireland. But although the defendant had personally done nothing in Middlesex or in England, he was, notwithstanding, held to be liable for the publication in that county, and was accordingly found guilty by the jury. There are various other cases in England and in this country, determined on the same principle. (*Rex v. Munton*, 1 Esp. 42; *Barkhamsted v. Parsons*, *supra*; *The Commonwealth v. Gillespie*, 7 S. & R. 477, 478; *United States v. Davis*, *supra*; *The case of George v. Hervey*, 8 Amer. Jurist, 69.) And to the same effect are the views of the late Mr. Justice Cowen as expressed in Rathbun's case. (21 Wend. 528 to 541; see also *Stark. on Crim. Pl.* 24.) And the principle is too reasonable and just of itself, and too well sustained by adjudged cases, to admit, in my judgment, of any serious doubt.

This in no sense affirms or implies an extension of our laws be-

yond the territorial limits of the state. The defendant may have violated the law of Ohio by what he did there, but with that we have no concern. What he did in Ohio was not, nor could it be, an infraction of our law or a crime against this state. He was indicted for what was done here, and done by himself. True, the defendant was not personally within this state, but he was here in purpose and design, and acted by his authorized agents. *Qui facit per alium facit per se*. The agents employed were innocent, and he alone was guilty. An offence was thus committed, and there must have been a guilty offender; for it would be somewhat worse than absurd to hold that any act could be a crime if no one was criminal. Here the crime was perpetrated within this state, and over that our courts have an undoubted jurisdiction. This necessarily gives to them jurisdiction over the criminal. *Crimen trahit personam*.

For all civil purposes a person out of this state may act by procuration within its limits, and thus, although absent at the time, he may become subject to the state law. Rights may thus be acquired by the absent party, as he also may become civilly liable under the law of this state, for what is done here by his authorization and procurement. The individual remedy, in such case, is perfect; and if the criminal law of the state is thus violated, why should not the absent offender be responsible criminally, when afterwards found within the state?

In authorizing another to act for him, the principal so far voluntarily submits himself to the law of the place where the authorized act is to be performed. This is confessedly so for all civil purposes. If an act thus authorized results in wrong to an individual, his right to redress against the principal, though absent, is undoubted. As to the person injured, the local law was violated by the absent wrongdoer; and if the act done was also a violation of the local criminal law, is the author and procurer of the deed guiltless? Does the law hold him to have been within its jurisdiction so far as respects the civil remedy, but not for the purpose of punishment? I see no ground on which the distinction can be sustained. An absent party procures an act to be done within this state, and so far as respects criminal or civil responsibility, I think he should not be allowed to say he is not amenable to the law. He clearly would be so if the act had been done by himself in person

within the limits of the state, and it is precisely the same if done by an innocent agent.

Upon the facts conceded by the plea in this case, no one can entertain a doubt that the defendant is civilly liable to Suydam, Sage & Co., for the wrong done to them. But upon what principle except that what he did was a violation of the law of this state? What was done by the agents of the defendant must be deemed his act, or he broke no law of this state; and if our law was not violated, no wrong was done to Suydam, Sage & Co. But if the fraudulent acts done in New York are to be deemed the acts of the defendant, then he did what the law declares to be a felony, and for which he was consequently indictable. I certainly should not be for holding the defendant responsible civilly for this act, if he ought to be held guiltless of any crime. If he broke the law at all, he did so for all purposes, criminal as well as civil. It was a crime against the state as well as a wrong done to individuals, and the perpetrator should be held responsible in both respects. Civil redress for this violation of our law would be afforded by the courts of Ohio, as well as of New York; but the criminal law of a state can be enforced only by its own tribunals. The matters pleaded in this case are, in my opinion, no answer to the indictment. Conceding every fact alleged in this plea to be true, still the defendant may have been guilty of the crime charged against him.

The judgment should therefore be reversed and judgment rendered for the people on the demurrer.

Judgment accordingly.

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*b. Accessory After the Fact.*

*Wren v. Commonwealth, 26 Grat. (Va.) 952. (1875.)*

CHRISTIAN, J., delivered the opinion of the court.

This is a writ of error to a judgment of the Hustings Court of the city of Richmond.

The case is before this court for the second time.

The accused was indicted in the said Hustings Court, *as accessory* after the fact to a felony, of which one John Dull was convicted in said court. The indictment after setting out, in proper form, the felony committed by the said John Dull, charged "that John Wren" (the plaintiff in error), "well knowing the said John

Dull to have committed the said felony in form aforesaid; to-wit, since the said felony was committed in the year aforesaid, in the city aforesaid, him the said John Dull did then and there unlawfully *receive, harbor and maintain*, against the peace and dignity of the commonwealth of Virginia."

Under this indictment the accused was found guilty at the November term of the said Hustings Court; and his fine assessed by the jury at one cent; and was sentenced by the court to twelve months imprisonment in the city jail; and to labor upon the public streets, or other public works, for seven hours a day during said term of imprisonment. To that judgment a writ of error was awarded by this court; and upon the hearing of said writ of error at the last term, the judgment was reversed, and the accused was remanded to the said Hustings Court for a new trial.

It is proper to remark, that the judgment and opinion of this court upon the former hearing was confined to a single point; and that was that the instructions given by the court were calculated to mislead the jury, and were therefore erroneous. The opinion was confined to the single point, and the judgment was reversed upon that ground only.

At the February term of the said Hustings Court, the accused was again tried upon the same indictment; was again found guilty, and his fine assessed by the jury at \$200; and was sentenced by the court to imprisonment for the period of ten months and until payment of said fine.

To this judgment a writ of error was awarded by this court.

The counsel for the prisoner, in his petition for a writ of error, assigns two grounds of error: 1st. The granting, by the court, of the instructions asked for by the commonwealth's attorney: and 2d. The overruling of his motion for a new trial.

The second assignment of errors will be disposed of first.

The court below refused to certify the facts proved because the evidence was conflicting; but certified all the evidence offered, both by the commonwealth and the accused. According to the rules established by this court, in considering such a bill of exceptions, the court will reject all the evidence offered by the prisoner in conflict with that offered by the commonwealth, and determine, upon the testimony of the commonwealth alone and all fair and legal inferences to be drawn therefrom, whether the offence charged in the indictment is made out and established by the proof: in



other words, whether admitting all the facts proved by the commonwealth, without reference to those proved by the accused, these facts constitute the offence charged in the indictment.

The accused is charged with accessorial guilt. He is charged in the indictment with unlawfully receiving, harboring and maintaining John Dull, knowing him to have committed a felony. This charge constitutes what the law denominates "an accessory after the fact." The common law definitely and distinctly defines who is such an offender. He is a person who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon. 1 Hale P. C. 618; 1 Arch. Crim. Pract. 78, and cases there cited.

The reason on which the common law makes a party in such a case criminal, is that the course of public justice is hindered, and justice itself is evaded by facilitating the escape of the felon.

To constitute one an accessory after the fact, three things are requisite: 1. The felony must be completed; 2. He must know that the felon is guilty; 3. He must receive, relieve, comfort or assist him. It is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he has committed a felony. 2 Hawk. ch. 29, § 32. And although it seemed at one time to be doubted, whether an implied notice of the felony will not in some cases suffice, as where a man receive a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety, it seems to be the better opinion, that some more particular evidence is requisite to raise the presumption of knowledge. 1 Hale 323, 622; 3 P. Wms. R. 496; 4 Black. Com. 37.

But knowledge of the commission of the felony must be brought home to the accused, and whether he had such knowledge is always a question for the jury.

As to the receiving, relieving and assisting, one known to be a felon, it may be said in general terms, that any assistance given to one known to be a felon in order to hinder his apprehension, trial or punishment, is sufficient to make a man accessory after the fact; as that he concealed him in the house, or shut the door against his pursuers, until he should have an opportunity to escape; or took money from him to allow him to escape; or supplied him with money, a horse or other necessities, in order to enable him to escape; or that the principal was in prison, and the jailer was

bribed to let him escape; or conveyed instruments to him to enable him to break prison and escape. This and such like assistance to one known to be a felon, would constitute a man accessory after the fact. 1 Hale 619, 621; 2 Hawk. c. 29, § 26. But merely suffering the principal to escape, will not make the party accessory after the fact; for it amounts at most but to a mere omission. 1 Hale 619; 9 H. iv., 1. Or if he agree for money not to prosecute the felon; or if knowing of a felony, fails to make it known to the proper authorities; none of these acts would be sufficient to make the party an accessory after the fact. If the thing done amounts to no more than the compounding a felony, or the misprision of it, the doer will not be an accessory. 1 Bishop, § 633; 1 Hale 371, 618. "The true test (says Bishop, § 634) whether one is accessory after the fact, is to consider whether what he did was done by way of personal help to his principal, with the view of enabling his principal to elude punishment; the kind of help rendered appearing to be unimportant."

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*c. In What Crimes We Have Accessories.*

*Ward v. People, 6 Hill (N. Y.) 144. (1843.)*

WALWORTH, Chancellor:

The plaintiff in error had been convicted for a petit larceny in stealing ice from the ice-house of J. Fay; which ice appeared by the conviction to have been the property of Fay, and of the value of one dollar. He was afterwards indicted for a second offence of petit larceny in stealing a quantity of butter, stated in the indictment to have been the property of J. Flagg. Upon the trial of the indictment, Ward, the plaintiff in error, objected that ice was not a subject of larceny, and that the record produced did not therefore show a legal conviction of the former offence of petit larceny; which objection was overruled by the court. Flagg testified that he was the owner of the butter which was stolen from his possession, and that he bought it of the master of a canal boat. Ward thereupon proposed to ask the witness whether he did not steal the butter on board the boat, or whether he and the master of the boat did not steal it together; which question was objected to by the public prosecutor and overruled by the court. He thereupon gave evi-

dence tending to prove that he did not himself steal the butter from Flagg, but sent another person to steal it; and that they afterwards divided the butter between them. And he requested the court to charge the jury that, if the butter was thus stolen, he was merely an accessory, and could not be convicted as a principal for the petit larceny. This the court refused; but charged the jury that, if the other person stole the butter, in Ward's absence, by his advice and procurement, he might be convicted as a principal, as there were no accessories in petit larceny. Exceptions were taken to these several decisions of the court, and upon argument of the exceptions before the supreme court, they were disallowed; and Ward was sentenced to imprisonment in the state prison.

It is not necessary to examine the question whether the court before whom the indictment for the second offence was tried, had a right to decide in this collateral way whether the first conviction was not erroneous. For there can be no doubt that ice, when collected and preserved for use in an ice-house, becomes individual property, so as to make it the subject of larceny; although it was not so when it constituted a part of the river or pond from whence it was originally taken. (*See Barb. Mag. Crim. Law*, 160.)

The public prosecutor could not object to the question put to Flagg upon the ground that if answered in a particular way it would subject him to a criminal prosecution. That is an objection that the witness alone is authorized to make.<sup>(a)</sup> But the objection was properly sustained upon the ground that the answer to the question was not relevant to the matter of the issue; as it was not material to know whether Flagg became possessed of the butter wrongfully or otherwise. (*Id.* 162; 2 *Russ. on Crimes*, 156, *Am. ed.* of 1836; 1 *Leach's C. C.* 522.)

The court was also right in charging the jury that if Arnold stole the butter in the absence of Ward, but by his advice and procurement, the latter was a principal in the larceny. Lord Coke says that in the highest offence and lowest injury, there are no accessories, but all are principals; as in treason, petit larceny and trespass. (2 *Inst.* 183.) And the law has been settled for nearly two hundred years that in petit larceny there can be no accessory, on account of the smallness of the felony. Those who procure, aid or advise in the commission of the offence are principals. And those who merely assisted the escape of the perpetrator of the offence,

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(a) See *Cloyes v. Thayer* (3 Hill, 564, 566).

were not, at common law, regarded as criminal. (12 *Coke's Rep.* 81; 1 *Hale's P. C.* 530, 616; *Barb. Mag. Crim. Law*, 177; *Foster's C. L.* 73; 2 *East's C. L.* 743; *Cro. Eliz.* 750; 2 *Hawk. P. C.* 440.)

The plaintiff in error was therefore rightfully convicted of this second offence of petit larceny; and the judgment of the court below should be affirmed.

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*d. Trial of Accessories.*

*McCarty v. State*, 44 *Ind.* 214. (1873.)

WORDEN, J.:

This was an indictment against Henry McCarty and Isaac McCarty, containing two counts. The first count charged them both, as principals, with the commission of an assault and battery upon Marion Grimes with intent to murder him.

The second count charged Henry McCarty with the commission of the assault and battery upon Grimes with the like intent, and that the appellant, Isaac McCarty, was accessory before the fact of said offence.

The defendants demanded a separate trial, and thereupon the state elected to try Isaac first. He was thereupon put upon his trial and found guilty on the second count in the indictment, and sentenced to pay a fine and be imprisoned in the penitentiary for the term of two years. Before judgment was rendered against the defendant Isaac, on the verdict, Henry had been put upon trial, on the indictment, and had been acquitted, and judgment had been rendered in his favor.

The appellant produced the record showing the acquittal of Henry, and the judgment in his favor, and moved to be discharged; but the court overruled his motion, and he excepted. Judgment was then pronounced against him on the verdict.

The verdict against the appellant upon the second count in the indictment, saying nothing in respect to the first, was equivalent to a verdict of acquittal upon the first. *Weinzorpfli v. The State*, 7 *Blackf.* 186.

The appellant was found guilty only of being accessory before the fact to the offence charged against Henry McCarty, as principal.

But before judgment against the appellant, the alleged principal was tried and acquitted; and the question arises, whether after the acquittal of the principal, judgment could be rightfully rendered against the appellant, charged as such accessory.

"The leading doctrine in respect to an accessory is, that he follows, like a shadow, his principal. He can neither be guilty of a higher offence than his principal; nor guilty at all, as accessory, unless his principal is guilty. \* \* \* So, according to the general doctrine, not only a man cannot be guilty as an accessory unless there is a principal who is guilty; but also he cannot be convicted except jointly with or after the principal, whose acquittal acquits him." 1 Bishop Crim. Law, secs. 666, 667. See *Johns v. The State*, 19 Ind. 421. We quote the following paragraph from 4 Cooley's Bl. 323:

"By the old common law the accessory could not be arraigned till the principal was attainted, unless he chose it; for he might waive the benefit of the law: and therefore principal and accessory might, and may still, be arraigned, and plead, and also be tried together. But otherwise, if the principal had never been indicted at all, had stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned: for *non constitit* whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen where it was possible that a trial of the principal might be had subsequent to that of the accessory; and therefore the law still continues that the accessory shall not be tried so long as the principal remains liable to be tried hereafter. But by statute, 1 Ann. c. 9, if the principal be once convicted, and before attainder (that is, before he receives judgment of death or outlawry), he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases, in which no subsequent trial can be had of the principal, the accessory may be proceeded against as if the principal felon had been attainted; for there is no danger of future contradiction. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better

opinion, and founded on the true spirit of justice, that the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact as in point of law."

Having thus adverted to the common law on this subject, we proceed to inquire how far it has been changed by our statute. Section 49 of the criminal code (2 G. & H. 453) subjects persons, aiding or abetting in the commission of any offence specified in the act, or who shall counsel, etc., the offence to be committed, to the same punishment as that to be inflicted upon the principal.

Section 50 defines what circumstances shall be deemed to constitute any person therein mentioned an accessory after the fact, and prescribes the punishment.

Section 51 is as follows: "Every person who shall be guilty of any crime punishable by the provisions of the last two preceding sections, may be indicted and convicted before or after the principal offender is indicted and convicted." This section undoubtedly authorizes the trial and conviction of the accessory before the principal is convicted; but it does not, in terms, authorize the conviction of the accessory after the principal has been tried and acquitted. Under this provision, if any accessory is convicted, and the term of the court has passed, at which judgment was rendered against him, so that the court would not have the common authority to set it aside, we do not see how he could legally avail himself of the subsequent acquittal of the principal. In such case, it would seem that he must abide by the conviction, having no remedy save that afforded by executive clemency.

Shall the statute be construed to authorize the conviction of the accessory after the acquittal of the principal? It does not, in terms, as we have seen, so provide. By its provisions, the accessory may be tried and convicted, either after the principal has been tried and convicted, or before the principal has been tried, his guilt remaining, in the meantime, undetermined. But if, at any time before the final conviction of the accessory, the principal has been tried and acquitted, there is no authority, either in the principles of the common law or under the statute quoted, for proceeding to the final conviction of the accessory.

In this case, the appellant had been found guilty by the verdict of a jury, but before judgment thereon the principal had been tried and acquitted. This entitled the appellant to be discharged, and,

in our opinion, the court below erred in overruling his motion for such discharge.

The judgment below is reversed, and it is ordered that the appellant be discharged from imprisonment in the state prison.

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### 3. CORPORATIONS.

*State v. Agricultural Society, 54 N. J. L. 260. (1892.)*

The opinion of the court was delivered by

VAN SYCKEL, J.:

The defendant was convicted in the Passaic Quarter Sessions for keeping a disorderly house.

In addition to the alleged jurisdictional defect, and the alleged defects in the record which have been discussed in the case of *George H. Engeman et al. v. The State*, decided at the present term of this court, other errors are assigned for reversal which it is necessary to consider.

In the first place it is denied that the trial court obtained jurisdiction of the corporation.

Section 80 of the Criminal Procedure act provides that when the summons or notice to the corporation shall be returned summoned or served, the corporation shall be considered as in court, and as appearing to said indictment, and the court shall order the clerk to enter an appearance for said corporation and endorse the plea of not guilty upon said indictment.

This statute applies only to involuntary appearances by corporations.

It has never been doubted that corporations could appear and plead to indictments by attorney, and the practice has always prevailed to permit attorneys of our courts to appear for corporations they claim to represent. In fact, corporations cannot appear in person, they must appear by attorney.

In this case the record shows that Robert I. Hopper, one of the practicing attorneys of this court, appeared and filed a demurrer to the indictment. If he had appeared, knowing that he had no authority to do so, it would have been in contempt of the trial court. His appearance was presumably lawful, otherwise the trial court should, in all cases where a corporation appears by attorney,

require him to establish his right to do so by competent evidence. Such has never been the practice; the burden is on the corporation to show that the appearance was unauthorized.

As the record stands, it sufficiently appears that the defendant was in court to answer to the indictment.

It need not appear in the record that the trial court ordered the clerk to enter an appearance for said corporation and endorse the plea of not guilty. That, also, was presumably done.

The Quarter Sessions is not an inferior court in the sense that it must, in all respects, show its jurisdiction. *Gray v. Bastedo*, 17 *Vroom* 453.

In the second place, it is objected that sentence was pronounced after the demurrer was overruled, without giving the defendant corporation an opportunity to plead not guilty.

Lord Hale says: "If a person be indicted or appealed of felony and he will demur to the appeal or indictment, and if it be judged against him he shall have judgment or be hanged, for it is a confession of the indictment." 2 *Hale P. C.* 257.

In *King v. Gibson*, 8 *East* 107, the court agreed that in criminal cases, not capital, if the defendant demur to an indictment, the court will not give judgment against him to answer over, but final judgment.

Mr. Bishop says: "With us, in misdemeanor, the judgment against a defendant on his demurrer is final, unless he has leave to withdraw it to answer over." 2 *Bish. Cr. Pro.*, § 783, and cases there cited.

Such is the established practice in New Jersey. The defendant may ask leave to answer over, and under ordinary circumstances it will be granted; but if no such request is made, judgment will be pronounced.

The record does not show that any request was made by the defendant to answer over in this case after the demurrer was overruled, and, therefore, final judgment was properly passed.

In days past, when the death penalty attached to crimes comparatively insignificant, common humanity constrained the courts to be astute to seize upon the slightest ground for reversing convictions; but under our system of criminal jurisprudence, which shields the defendant by the presumption of innocence, by a liberal right of peremptory challenge and by the necessity of a unanimous verdict, and where the penalty denounced against offences is humanely



graduated according to their character, there should be clear error to constitute a mistrial.

*Thirdly.* It is urged that a corporation cannot be indicted for keeping a disorderly house.

Some of the earlier cases held that trespass or case would not lie against a corporation for a private nuisance, but that doctrine has long since been exploded. In early days when corporate bodies were few, it was a matter of comparatively small consequence whether such an action could be maintained.

In these days, however, when the great concerns of business are carried on chiefly through these artificial persons, it would be most oppressive to hold that they are not amenable to answer for such wrongs as subject natural persons to prosecution.

Mr. Wharton says that no good reason can be assigned why the same acts, for which these bodies are subject to civil suit, may not equally be the basis of criminal proceedings when they result in injury to the public at large. 1 *Whart. Cr. L.* § 87.

*The Queen v. The Great North of England Railway Co.*, 9 Q. B. 316, is a leading and instructive case on this subject, showing the advance which the doctrine holding corporations criminally liable had made at the date of that adjudication.

The earlier cases are cited there, and the summing up of Lord Chief Justice Denman shows how firmly he held to the idea, that upon reason and policy an indictment could be supported against a corporation for misfeasance as well as for non-feasance.

He entertained no doubt that a corporation may be guilty, as a corporate body, of commanding acts to be done to the nuisance of the community at large.

In reply to the suggestion that the individuals who concur in doing the inhibited acts on behalf of the corporation may be indicted, he said, that while of that there was no doubt, there can be no effectual means for deterring from the commission of criminal acts, except the remedy by an indictment against those who truly commit them—that is, the corporation acting by its majority; and that there is no principle which places them beyond the reach of the law for such proceedings.

In *Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray 339, the Massachusetts Supreme Court adopted the same view, declaring that the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal

remedies to corporations, and assimilate them, as far as possible, in their legal duties and responsibilities to individuals.

Mr. Beach, in his treatise on Private Corporations (Vol. II., p. 458), says that the tendency of judicial decision has been to extend the liability of corporations in civil actions for the misfeasance of their agents, so that it is well settled that they may be held liable for libel, malicious prosecution and for assault and battery committed by their agents in the performance of their duties, and in view of the fact that they may in such suits be subjected to exemplary or punitive damages, the assertion that they cannot be held liable to indictment for any offences, which derive their criminality from evil intent, may well be questioned.

The very basis of the action for libel or for malicious prosecution is the evil intent, the malice of the party defendant. It is difficult, therefore, to see how a corporation may be amenable to civil suit for libel and malicious prosecution and private nuisance, and mulcted in exemplary damages, and at the same time not be indictable for like offences, where the injury falls upon the public.

That malice and evil intent may be imputed to corporations has been repeatedly adjudged. *Morton v. Metropolitan Life Ins. Co.*, 103 N. Y. 645; *Reed v. Home Savings Bank*, 130 Mass. 443; *Buffalo Company v. Standard Oil Co.*, 106 N. Y. 669.

The case last cited was an action to recover damages caused by conspiracy.

So far as this question has been agitated in New Jersey, our decisions have been in line with the cases which have been cited. *State v. Morris Canal Co.*, 2 Zab. 537; *State v. Godwinville, &c.*, 20 Vroom 266; *McDermott v. The Evening Journal*, 14 Id. 488; *Brokaw v. New Jersey R. R. Co.*, 3 Id. 328.

The question whether criminal intent may be imputed to a corporation is not necessarily involved in the discussion of the case before us.

The habitual indulgence in the vicious practices on the premises of the defendant corporation stamps it as a disorderly house, without regard to the intent which prompted the disorder.

In my opinion, the judgment below should be affirmed.

## CHAPTER V.

### MERGER OF OFFENSES.

*State v. Setter, 57 Conn., 461. (1889.)*

ANDREWS, C. J.:

The appellant, together with one Mary Reese, was informed against in the criminal side of the Court of Common Pleas in New Haven County for the offense of conspiracy. The information charged "that on or about the third day of April, 1889, at the city of New Haven, Mary Reese and Jennie Setter, both transient persons temporarily residing in said city, with force and arms did then and there wickedly, designing and intending to commit the crime of theft therein, fraudulently, maliciously and unlawfully conspire, combine, confederate and agree together between themselves to enter, and did enter, the store of F. M. Brown & Company of said city of New Haven and there situate, in which store were deposited goods, wares and merchandise, the proper estate of the said F. M. Brown & Company, with intent then and there in the said store aforesaid to commit the crime of theft," &c. In brief, the information charges that the persons therein named conspired to steal generally in the store of F. M. Brown & Co.—possibly all the goods in that store; at any rate so many of the goods as they might be able to lay their hands on.

The appellant had a separate trial, was convicted and sentenced, and has appealed to this court. Upon her trial the state, for the purpose of proving the combination between herself and her companion, and for the purpose of proving the intent alleged, offered evidence which tended to show that the accused actually stole twelve neckties of the value of fifty cents each, in the store of F. M. Brown & Co. There was no evidence of any other stealing in the store.

The counsel for the appellant asked the court to instruct the jury as follows: "Under the laws of this state a conspiracy to commit the crime of theft is a misdemeanor, while the crime of theft itself is a felony, and that the law is so that if the conspiracy is consummated and the theft is actually committed, then the con-

spiracy is merged in the theft and the accused cannot lawfully be convicted of conspiracy; that where the felony is in fact committed a conspiracy to commit such felony cannot be indicted and punished as a distinct offense. If you find, therefore, from the evidence, that the crime which it is alleged the accused conspired to commit, to wit, the theft of the goods, the property of F. M. Brown & Co., was in fact consummated and the theft was actually committed, your verdict must be that the accused is not guilty of the offense for which she is now on trial." The court did not so charge the jury.

The only question argued before the court is, whether or not the crime of conspiring to steal, as set forth in the information, was merged in the crime of the actual theft of which evidence appeared on the trial. In the reasons of appeal the question is stated thus: The court erred while stating to the jury that "if the overt act has been carried into execution and the offense has been punished once it cannot be punished a second time;" and in not also instructing the jury, as requested by the defendant, "that when the felony is in fact committed a conspiracy to commit such felony cannot be indicted and punished as a separate offense."

The broad claim of the appellant is, that if the crime to commit which the conspiracy is formed is actually committed, then the conspiracy is merged in the committed crime and ceases itself to be a crime at all. It is admitted, however, that if the contemplated crime be of that class of crimes called misdemeanors, the conspiracy is not merged; and that in a case where there is a conspiracy to commit a misdemeanor and the misdemeanor is actually committed, the offender may be punished for the conspiracy and for the misdemeanor also. But it is insisted that if the contemplated crime is of that class called felonies, then if the felony is actually committed the conspiracy is merged and no longer exists as a separate and distinct offense. Put in its simplest form the argument is this: Conspiracy is a misdemeanor; theft is a felony; a misdemeanor is a less crime than a felony, and so in a case where there is a conspiracy to commit a theft, that crime being a felony, and the theft is actually committed, the less offense is merged in the greater.

Stated in this way the argument seems quite imposing. The force of the argument comes largely from the use of the word

"felony," and in giving to it the same meaning it had in the common law. Originally the term imported all those offenses of which the feudal consequence was the forfeiture of all the offender's land and goods; to which, in later times, capital or other punishment was sometimes added. In American law the word has no clearly defined meaning except as it is given a meaning by some statute. In Massachusetts there is a statute which enacts that any crime punishable by death or imprisonment in the state prison is a felony, and that no other crime shall be so considered. There is a similar statute in New York and in some of the other states. In Swift's System, published in the year 1796 (Vol. 2, pages 384 and 385), the learned author says: "Felony, according to the English law, signifies some crime the punishment of which is a forfeiture of estate; but in common consideration it is a capital crime. In this state, in the title of two statutes, the word 'felonies' is used. \* \* \* The word is never introduced into the body of any statute, and is applied to the description of crimes not capital and for which there is no forfeiture of estate. It is therefore apparent that this word cannot be used in the same sense and for the same crimes as in England; nor does it with precision comprehend any class or description of crimes. A word of such uncertain meaning ought to be banished from a code of laws, for nothing produces greater confusion and perplexity than the use of terms to which no precise and clear idea can be affixed. \* \* \* The word 'feloniously' is used in indictments for all capital crimes and for many not capital, as for theft; but as 'felonious' in an indictment can mean nothing more than 'criminal' and does not designate the nature or the class of the crime, it may be deemed unnecessary and immaterial and ought to be exploded by our courts."

Since the time when Judge Swift wrote the word "felony" has disappeared from the statute, although the word "feloniously" is still used in indictments and informations. And while it is still true that this word does not with precision comprehend any class or description of crimes in Connecticut law, it may be pretty safely asserted that petty larceny is not a felony in this state.

The earliest American case cited by the counsel for the appellant in support of their claim of merger is *Commonwealth v. Kingsbury*, 5 Mass., 106. In that case the court say: "We have considered this case and are of opinion that the misdemeanor is

merged. Had the conspiracy not been effected it might have been punished as a distinct offense; but a contrivance to commit a felony and executing the contrivance cannot be punished as an offense distinct from the felony, because the contrivance is a part of the felony when committed pursuant to it. The law is the same respecting misdemeanors. An intent to commit a misdemeanor manifested by some overt act, is a misdemeanor, but if the intent be carried into execution the offender can be punished but for one offense."

This case is the authority given for the dictum in 2 Swift's Digest, page 359, and it is the leading if not the only authority for the decision in every one of the cases cited on the appellant's brief. It is noticeable that Judge Swift, while giving the case above named as authority for the law that a conspiracy merges in a felony, in almost the very next sentence on the same page repudiates that case, so far as it says that a conspiracy will merge in a misdemeanor, although the reasons given by the judge who gave the opinion in that case for the merger in a misdemeanor are the same as for a felony. In this respect all the cases cited follow Judge Swift. They reject the reasoning in the Massachusetts case when it applies to a misdemeanor, and adopt it when it applies to a felony.

Mr. Bishop in his Treatise on the Criminal Law, 7th edition, section 814, after discussing the rule that a conspiracy merges in a felony, remarks: "The doctrine, the reader perceives, is contrary to just principle; it has been rejected in England, and though there may be states in which it is binding on the courts, it is not to be deemed the general American law." Prof. Wheaton, Crim. Law, 8th ed., section 1344, says: "The technical rule that a misdemeanor always sinks in the felony when the two meet, has in some instances been recognized in this country, though without good reason. \* \* \* And in several of our courts a disposition has been exhibited to reject the doctrine in all cases." See cases cited below.

In England the doctrine that a conspiracy to commit a felony is merged in the felony itself, has been expressly rejected. Lord Denman, in rendering the judgment of the Court of Queen's Bench in *Regina v. Button*, 11 Queen's Bench, 929, said: "A misdemeanor which is a part of a felony may be prosecuted as a misdemeanor, though the felony has been completed." The case

was one where the defendants were charged with a conspiracy to commit a theft, and the evidence tended to show that the theft had been actually committed. *Regina v. Neale*, 1 Denison's Crown Cas., 36, is to the same effect.

If a conspiracy to commit a felony is regarded as an attempt to commit that felony, then the authorities very largely preponderate to the effect that there is no merger. *State v. Shepard*, 7 Conn., 54; *Commonwealth v. Walker*, 108 Mass., 309; *Commonwealth v. Dean*, 109 Mass., 349; *Barnett v. The People*, 54 Ill., 325; *Bonsall v. The State*, 35 Ind., 460; *The People v. Bristol*, 23 Mich., 118; *The People v. Smith*, 57 Barb., 46; *Commonwealth v. McPike*, 3 Cush., 181.

That one criminal offense may sometimes be merged in another is doubtless true. The principles upon which the doctrine of merger seems to rest are that the offense merged is lesser than the one in which it is merged, and that the ingredients of the smaller one are so identical with the ingredients of the larger that when both have been committed they cannot in reason and justice be separated; so that to punish an accused in such a case for both offenses would be in effect to punish the same act twice. In the case above cited of *Commonwealth v. Kingsbury*, the reasons given seem to treat the conspiracy as the beginning of the very act the ending of which was the felony or the misdemeanor. "There is at common law a wide distinction between a felony and a misdemeanor. It affects alike the punishment, the procedure, and several rules governing the crime itself. Out of the distinction grows the doctrine that the same precise act viewed with reference to the same consequences, cannot be both a felony and a misdemeanor,—a doctrine which applies only when the same precise act constitutes both offenses." 1 Bishop Cr. Law (7th ed.), section 787.

"It is supposed that a conspiracy to commit a crime is merged in the crime when the conspiracy is executed. This may be so when the crime is of a higher grade than the conspiracy and the object of the conspiracy is fully accomplished; but a conspiracy is only a misdemeanor, and when its object is only to commit a misdemeanor it cannot be merged. When two crimes are of equal grade there can be no legal technical merger." *The People v. Mather*, 4 Wend., 265.

To make these principles available for the appellant it must

be shown that the conspiracy of which she was convicted is a crime of a lesser grade than the larceny which she claims was proved. In the absence of statutory graduation there is no test by which to determine the grade of crimes other than the punishment which may be inflicted. Conspiracy may be punished by imprisonment in the state prison for a term not exceeding five years and by a fine not exceeding five hundred dollars. Larceny to any value less than fifteen dollars can be punished by no more than thirty days in the county jail and a fine of not more than seven dollars. By this test conspiracy is much the greater crime.

Nor are the ingredients of conspiracy the same as of theft. Theft may be committed by one person as well as by two or more; it requires some physical act in the nature of a trespass by which the possession of the thing stolen is taken from the owner, and the act must be accompanied by the intent of the thief to deprive the owner of his property. On the other hand conspiracy cannot be committed except by two or more persons. It is the agreeing or confederating together by two or more persons to commit some crime or misdemeanor. Such confederation or agreement is itself the offense. Unlike theft no overt act is necessary, the unlawful agreement makes the crime, and it is complete the moment the agreement is entered into. *State v. Glidden*, 55 Conn., 46; *Commonwealth v. Eastman*, 1 Cush., 228. Its legal character depends neither upon that which actually follows it nor upon that which is intended to follow it; it is the same whether its object be accomplished or abandoned. It may be followed by one overt act, or a series, but as an offense it is complete without them. *Rex v. Rispal*, 3 Burrow, 1320; *Rex v. Kimberty*, 1 Levins, 62. It is an offense falling within that part of the criminal law which seeks to prevent the commission of crimes. "The unlawful confederacy is therefore punished to prevent the doing of any act in the execution of it." 2 Swift's Digest, 350. It is a distinct offense well known to the criminal law, depending upon clear principles, and having characteristics and ingredients which separate it from all other crimes; an offense the criminality of which is not to be measured by the criminality of its object. Amos's Science of Law, 256. "The confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as requires criminal restraint, although none would be necessary were the same thing proposed or even attempted to be done by



any person singly. A solitary offender may be easily detected and punished. But combinations against law are always dangerous to the public peace and to private security. To guard against the union of numbers to effect an unlawful design is not easy and to detect and punish them is often difficult." *Commonwealth v. Judd*, 2 Mass., 137.

Upon the whole examination we are of opinion, upon principle as well as upon authority, that this conviction for a conspiracy to commit theft ought to be sustained, although the evidence by which it was proved, proved also that the theft had been actually committed.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

## SPECIFIC CRIMES.

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### CHAPTER VI.

#### OFFENSES AGAINST THE GOVERNMENT AND OFFENSES AGAINST THE LAW OF NATIONS.

##### TREASON, PIRACY, AND OTHER OFFENSES.

For a full discussion of the above offenses see the following cases: *Respublica v. Carlisle*, 1 Dall. (U. S.) 35, (1778); *United States v. Insurgents*, 2 Dall. (U. S.) 335, (1795); *United States v. Vigol*, 2 Dall. (U. S.) 346, (1795); *United States v. Mitchell*, 2 Dall. (U. S.) 348, (1795); *Exparte Bollman*, 4 Cranch (U. S.) 75, (1807); *United States v. Burr*, 4 Cranch (U. S.) 469, (1807); *People v. Lynch*, 11 Johns. (N. Y.) 549, (1814); *United States v. Hanway*, Federal Cases, No. 15299, (1851); *United States v. Greathouse*, 4 Sawyer (U. S.) 465, (1863); The Confiscation Cases, 20 Wall. (U. S.) 92, (1873); *Wallach v. Van Riswick*, 92 U. S. 202, (1875); *Windsor v. McVeigh*, 93 U. S. 274, (1876); *United States v. Palmer*, 3 Wheat. (U. S.) 610, (1818); *United States v. Smith*, 5 Wheat. (U. S.) 153, (1820); *United States v. Arjona*, 120 U. S. 479, (1887); and *United States v. Ybanez*, 53 Fed. Rep. 536, (1892).

## CHAPTER VII.

### OFFENSES AGAINST THE PERSON.

#### HOMICIDE IN GENERAL.

*Must be the Death of a Human Being.*

*State v. Winthrop, 43 Iowa 519. (1876.)*

ADAMS, J.:

The defendant is a physician, and was employed by one Roxia Clayton to attend her in childbirth. The child died. The defendant is charged with having produced its death. Evidence was introduced by the State tending to show that the child, previous to its death, respired and had an independent circulation. Evidence was introduced by the defendant tending to disprove such facts.

The defendant asked the court to give the following instruction:

“To constitute a human being, in the view of the law, the child mentioned in the indictment must have been fully born, and born alive, having an independent circulation and existence separate from the mother, but it is immaterial whether the umbilical cord which connects it with its mother be severed or not.”

The court refused to give this instruction, and gave the following:

“If the child is fully delivered from the body of the mother, while the afterbirth is not, and the two are connected by the umbilical cord, and the child has independent life, *no matter whether it has breathed or not, or an independent circulation has been established or not*, it is a human being, on which the crime of murder may be perpetrated.”

The giving of this instruction, and the refusal to instruct as asked, are assigned as error.

The court below seems to have assumed that a child may have independent life, without respiration and independent circulation. The idea of the court seems to have been that the life which the child lives between the time of its birth and the time of the estab-

ishment of respiration and independent circulation is an independent life. Yet the position taken by the Attorney-General, in his argument in behalf of the State, is fundamentally different. He says: "It will probably not be contended that independent life can exist without independent circulation, and hence the existence of the former necessarily presumes the existence of the latter, and so other or further proof is unnecessary." He further says: "The instruction complained of amounts to nothing more than the statement that, if the child had an independent life, then it was not necessary to establish those facts upon which the existence of life necessarily depends." If such was the meaning of the court below, the language used to express it was very unfortunate. The court said that, if the child had independent life, it is no matter whether an independent circulation had been established or not. The Attorney-General says that if the child had independent life, it had independent circulation, of course. But whether we take the one view or the other, we think the instruction was wrong. We will consider first the view that independent life and independent circulation necessarily co-exist, and examine the instruction as if that were conceded.

It follows that where a child is born alive, and the umbilical cord is not severed, and independent circulation has not been established, independent life is impossible, and the instruction amounts to this, that if the jury should find independent life under such circumstances, although it would be impossible, they might find the killing of the child to be murder. Such an instruction could serve no valuable purpose, and would necessarily involve the jury in confusion. It would do worse than that; it would tell the jury in effect that they might find independence of life in utter disregard of the conditions in which alone it could exist. To show how the defendant was prejudiced, if the instruction is to be viewed in this light, we may say that there was evidence that the *ductus arteriosus* was not closed. This evidence tended to show, slightly at least, that independent circulation had not been established. The instruction told the jury, by implication, that they might disregard this evidence. But we feel compelled to say that we do not think that the Attorney-General's interpretation of the instruction ever occurred to the court below. It is plain to see that the court below meant that independent life is not conditioned upon independent circulation. The error, if there was one, con-

sisted in assuming that it was not. The question presented for our determination is by no means free from difficulty. Can the child have an independent life, while its circulation is still dependent upon the mother? There are two senses in which the word independence may be used. There is actual independence, and there is potential independence. A child is actually independent of its father when it is earning its own living; it is potentially independent when it is capable of earning its own living. We think the court below used the word *independent* in the latter sense. While the blood of the child circulates through the *placenta*, it is renovated through the lungs of the mother. In such sense it breathes through the lungs of the mother. Wharton & Stille's Medical Jurisprudence, 2 Vol., Sec. 128. It has no occasion during that period to breathe through its own lungs. But when the resource of its mother's lungs is denied it, then arises the exigency of establishing independent respiration and independent circulation. Children, it seems, oftentimes do not breath immediately upon being born, but if the umbilical cord is severed, they must then breathe or die. Cases are recorded, it is true, where a child has been wholly severed from the mother, and respiration has not apparently been established until after the lapse of several minutes of time. During that time it must have had circulation, and the circulation was independent. Whether it had inappreciable respiration, or was in the condition of a person holding his breath, is a question not necessary to be considered for the determination of this case. It is sufficient to say, that while the circulation of the child is still dependent, its connection with the mother may be suddenly severed by artificial means, and the child not necessarily die. This is proven by what is called the Cæsarean operation. A live child is cut out of a dead mother and survives. Such a child has a potential independence antecedent to its actual independence. So a child which has been born, but has not breathed, and is connected with the mother by the umbilical cord, may have the power to establish a new life upon its own resources antecedent to its exercise. According to the opinion of the court below, the killing of the child at that time may be murder. It is true that after a child is born it can no longer be called a *fetus*, according to the ordinary meaning of that word. Beek says, however, in his Medical Juris., 1 Vol., 498: "It must be evident that when a child is born alive, but has not yet respired, its condition is precisely like that

of the *fetus in utero*. It lives merely because the *fœtal* circulation is still going on. In this case none of the organs undergo any change." Casper says, in his *Forensic Medicine*, 3 Vol., 33: "In *foro* the term 'life' must be regarded as perfectly synonymous with 'respiration.' Life means respiration. Not to have breathed is not to have lived."

While, as we have seen, life has been maintained independent of the mother without appreciable respiration, the quotations above made indicate how radical the difference is regarded between *fœtal* life and the new life which succeeds upon the establishment of respiration and independent circulation.

If we turn from the treatises on Medical Jurisprudence to the reported decisions, we find this difference, which is so emphasized in the former, made in the latter the practical test for determining when a child becomes a human being in such a sense as to become the subject of homicide. In *Rex v. Enoch*, 5 C. & P., 539, Mr. Justice J. PARKE said: "The child might have breathed before it was born, but its having breathed is not sufficiently life to make the killing of the child murder. There must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose."

In *Regina v. Trilloe*, 1 Carrington & Marshman, 650, ERSKINE, J., in charging the jury, said: "If you are satisfied that this child had been wholly produced from the body of the prisoner alive, and that the prisoner wilfully and of malice aforethought strangled the child, after it had been so produced, and while it was alive, and while it had an independent circulation of its own, I am of the opinion that the charge is made out against the prisoner." See also Greenleaf on Ev., 3 Vol., Sec. 136.

It may be asked why, if there is a possibility of independent life, the killing of such a child might not be murder.

The answer is, that there is no way of proving that such possibility existed if actual independence was never established. Any verdict based upon such finding would be the result of conjecture.

REVERSED.

*Cause and Time of Death.*

*State v. Bantley, 44 Conn. 537. (1877.)*

PARDEE, J.:

On the night of June 11th, 1876, the accused inflicted a severe gun-shot wound upon the arm of one March, between the elbow and shoulder. March died eleven days thereafter of lock-jaw. The prosecution claimed that death resulted from the wound; the accused claimed that it resulted from the treatment of the case by the attending physicians. The wound was dressed in the first instance by one surgeon, afterwards to the time of death by another; these differed radically as to the manner in which the case should have been treated.

The counsel for the accused claimed, and asked the court to charge the jury, that if they should find that the death of March was the result or consequence of willful mismanagement or gross carelessness on the part of the attending surgeons, they could not find the accused guilty of manslaughter, as charged in the information. The court charged the jury, that unless they should find that March died from a wound inflicted on him by the accused, as charged in the information, they could not convict him of manslaughter; but that if they should find that the accused willfully, and without justifiable cause, inflicted on March a dangerous wound, from which death would be likely to ensue, and if they should find also that his death did in fact ensue from and was caused by the wound, and not from any other cause, carelessness and mismanagement of whatever character on the part of the attending surgeons would be immaterial, and the treatment of the case by them, whatever it may have been, could not avail the accused as a defense. The jury having returned a verdict of guilty, the accused moved for a new trial for error in the charge.

As to the law applicable to this case, Roscoe says: "The law on this point is laid down at some length by Lord Hale. If, he says, a man gave another a stroke, which, it may be, is not in itself so mortal but that with good care he might be cured, yet if he dies within the year and day, it is a homicide or murder as the case is, and so it has been always ruled. But if the wound be not mortal,

but with ill application by the party or those about him of unwholesome salves or medicines the party dies, if it clearly appears that the medicine and not the wound was the cause of the death, it seems it is not homicide; but then it must clearly and certainly appear to be so. But if a man receive a wound which is not in itself mortal, but for want of helpful applications or neglect it turn to a gangrene or a fever, and the gangrene or fever be the immediate cause of the death, yet this is murder or manslaughter in him that gave the stroke or wound; for that wound, though it was not the immediate cause of the death, yet if it were the mediate cause, and the fever or gangrene the immediate cause the wound was the cause of the gangrene or fever, and so consequently *causa causans*." Roscoe's Criminal Evidence, 7th ed., 717; 1 Hale P. C., 428. In *Rex v. Rews*, Kelynge, 26, it was holden that neglect or disorder in the person who receives the wound will not excuse the person who gave it; that if one gives wounds to another who neglects the care of them and is disorderly, and does not keep that rule which a wounded person should do, if he die it is murder or manslaughter according to the circumstances of the case, because if the wounds had not been given the man had not died. In *Regina v. Holland*, 2 Mood. & Rob., 351, the deceased had been severely cut with an iren instrument across one of his fingers, and had refused to have it amputated; at the end of a fortnight lock-jaw came on and the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon expressed the opinion that early amputation would probably have saved his life. MAULE, J., held that a party inflicting a wound which ultimately becomes the cause of death is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. In *Commonwealth v. Pike*, 3 Cush., 181, it was held that where a surgical operation is performed in a proper manner and under circumstances which render it necessary in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of the death, the party inflicting the wound will nevertheless be responsible for the consequences. Greenleaf says (Greenleaf's Ev., 3d Vol., sec. 139, 5th ed.,) "If death ensues from a wound given in malice, but not in its nature mortal, but which being neglected or mismanaged the party died, this will not excuse the prisoner who gave it; but



he will be held guilty of the murder unless he can make it clearly and certainly appear that the maltreatment of the wound or the medicines administered to the patient or his own misconduct, and not the wound itself, was the sole cause of his death, for if the wound had not been given the party had not died." In *Rex v. Johnson*, 1 Lewin C. C., 164, the deceased died from a blow received in a fight with the prisoner; a surgeon expressed an opinion that a blow on the stomach, in the state in which the deceased was, arising from passion and intoxication, was calculated to occasion death, but not so if the party had been sober. HALLOCK, B., directed an acquittal, observing that where the death was occasioned partly by a blow and partly by a predisposing circumstance, it was impossible to apportion the operation of the several causes and to say with certainty that the death was immediately occasioned by any one of them in particular. Of this case Roscoe remarks that it may be doubted how far this ruling of the learned judge was correct. Roscoe's Crim. Ev., 7th ed., 718. In *Rex v. Martin*, 5 Car. & P., 130, where the deceased, at the time when the blow was given, was in an infirm state of health, PARKE, J., said to the jury: "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death, he must answer for it." In *Commonwealth v. Hackett*, 2 Allen, 136, it was held that one who has wilfully inflicted upon another a dangerous wound, with a deadly weapon, from which death ensued, is guilty of murder or manslaughter as the evidence may prove, although through want of due care or skill, the improper treatment of the wound by surgeons may have contributed to the death.

Upon these authorities we may state the rule as follows: If one person inflicts upon another a dangerous wound, one that is calculated to endanger and destroy life, and death ensues therefrom within a year and a day, it is sufficient proof of the offence either of manslaughter or murder as the case may be; and he is none the less responsible for the result although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskillful or improper treatment aggravated the wound and contributed to his death.

There is no such defect in the law as that the person who intentionally inflicts a wound calculated to destroy life, and from which death ensues, can throw responsibility for the act upon either

the carelessness or the ignorance of his victim; or shield himself behind the doubt which disagreeing doctors may raise as to the treatment proper for the case.

Indeed counsel for the defendant do not really deny the force of the rule. Their complaint is rather in the nature of a verbal criticism of the charge. The judge said to the jury that if the death of March resulted from the wound and from no other cause, carelessness and mismanagement of whatever character on the part of the attending surgeons would be immaterial. It is to be presumed in favor of a charge that it refers to matters concerning which witnesses have testified and to points concerning which counsel have presented arguments; and it is not to be presumed that it includes within its scope all possibilities. From this record we cannot perceive that any witness suggested even that the attending surgeons caused the death of March by an intentional misapplication or withholding of remedies, or that counsel in argument intimated any such thing. The motion states that the two doctors differed radically regarding the treatment proper for the case; the claim of each as to the other was that he had erred through ignorance, not by criminal intention; and when the judge used the expression complained of in this case, we are to presume that he referred, and that the jury understood him to refer, to that kind of mismanagement alone of which witnesses had testified and concerning which counsel had argued in their hearing. With this limitation the defendant has no occasion for complaint.

A new trial is not advised.

In this opinion the other judges concurred.

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*Proof of Death.*

*Ruloff v. People, 18 N. Y. 179. (1858.)*

By the Court, JOHNSON, Ch. J.:

At the opening of the trial the counsel for the prosecution, in answer to a question of the prisoner's counsel, stated that he did not propose to prove by any direct evidence that the infant daughter of the prisoner, with whose murder he was charged by the indictment, was dead or had been murdered, or that her dead body had ever been found or seen by any one, but that from the lapse of

time since the child and her mother were last seen, and from other facts and circumstances, he should ask the jury to infer and presume and find that the infant daughter was dead and that she was murdered by the prisoner. "The prisoner's counsel, on this, moved the court to stop the trial, for want of proof of the *corpus delicti*; that the rule laid down by Lord HALE, that no person should be convicted of murder or manslaughter unless the facts were proved to be done, or at least the body found dead," is the rule universally acted upon by our courts, and should never be departed from. The judge reserved the question till the evidence should be closed.

The prosecution gave proof tending to show that the prisoner did not live happily with his wife; that his wife and infant daughter were seen alive and well on the evening of June 24, 1845, by a woman who lived across the road from Ruloff's house. No person shows that either of them have been seen since. The next day Ruloff borrowed a wagon from a neighbor and took into it a box from his own house, which the neighbor helped him to place in the wagon; he drove off with it—where, is not shown; on the following day he returned with the wagon and box. It was shown that he had in his possession a ring which his wife had worn on the twenty-fourth, and a shawl and some other articles of her apparel; that he told stories as to her being at sundry places where she was proved not to have been, and generally conducted himself in such a way as to lead strongly to the inference that he was the author of whatever had happened to his wife and child, if anything had, in fact, happened to them. In the house clothes were found lying about in disorder, dishes unwashed, a skirt lying in a circle at the foot of the bed, and shoes, stockings and diapers. It was sworn that Ruloff had a cast iron mortar of twenty-five or thirty pounds weight, and flat irons, which on searching the house were not found. He absconded and was in Chicago early in August, under a false name; there said his wife and child had died six weeks before on the Illinois river, in Illinois, and left a box containing books, papers and articles of woman's apparel, which had belonged to Mrs. Ruloff, a paper on which were the words "Oh, that dreadful hour!" and a lock of light brown hair in another paper, labeled "A lock of [Harriet's or Mary's] hair;" the witness thought the word was "Harriet's."

At the close of the evidence, the prisoner's counsel renewed his motion, made at the opening of the cause, and insisted that, as it

now appeared that no direct evidence of the death or the murder of the infant daughter had been given, no conviction for murder could be properly had or allowed, and that the jury should be so advised and instructed, and should be directed to find a verdict of not guilty. The judge refused so to advise, direct and instruct the jury, and to his refusal the prisoner's counsel excepted.

The judge then charged the jury. After explaining the legal definition of murder, and the legal presumption of innocence in favor of the prisoner, and the duty of the prosecution, before they could rightfully ask a conviction, not only to prove the alleged murder, but also to establish by evidence the guilt of the prisoner beyond any reasonable doubt, he proceeded as follows: "The first branch of the case, the *corpus delicti*, as it is termed in the law, by which is meant the body of the crime, the fact that a murder has been committed, must be clearly and conclusively proved by the government. The *corpus delicti* is made up of two things: first, of certain facts forming the basis of the *corpus delicti*, by which is meant the fact that a human being has been killed; and secondly, the existence of criminal and human agency as the cause of the death. Upon this first branch of the case, the prisoner's counsel insists that it can only be proved by direct and positive evidence; that the government must prove the fact of death by witnesses who saw the killing, or at least the dead body must be found. It has been said by some judges, that a conviction for murder ought never to be permitted unless the killing was positively sworn to, or the dead body was found and identified. This, as a general proposition, is undoubtedly correct, but, like other general rules, has its exceptions. It may sometimes happen that the dead body cannot be produced, although the proof of death is clear and satisfactory. A strong case in illustration is that of a murder at sea, when the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel. Although the body cannot be found, nobody can doubt that the author of such crime is guilty of murder. In such a case, the law permits the jury to infer that death has ensued from the facts proved; the circumstances being such as to exclude the least, if not almost every probability, that such a person could have escaped with life; and yet there is a bare possibility in such a case that the person may have escaped with life.

"I am of opinion that the rule, as understood in this country,

does not require the fact of death to be proved by positive and direct evidence in cases where the discovery of the body, after the crime, is impossible. In such cases the fact may be established by circumstances, where the evidence is so strong and intense as to produce the full certainty of death. By the proof of a fact by presumptive evidence, we are to understand the proof of facts and circumstances from which the existence of such fact may be justly inferred. The facts and circumstances to establish the death in the case of murder, in the absence of any positive evidence, must be so strong and intense as to produce the full certainty of death, or, as Mr. WILLS says, 'the death may be inferred from such strong and unequivocal circumstances as render it morally certain, and leave no ground for reasonable doubt.' The government claim that they have proved the body of the crime, in the case under consideration, up to the strictest requirements of the rule. This is for you to determine. The determination of it involves the examination of all the facts and circumstances disclosed by the evidence in the case."

After, then, observing briefly upon some parts of the evidence, the judge concluded his charge by stating the rule that should govern them in their ultimate conclusion, as follows: "In regard to the first branch of the case, the establishment of the *corpus delicti*, the body of the crime, before you find it against the prisoner you must be satisfied from the evidence in the case that it is established by presumptive evidence of the most cogent and irresistible kind, that is, established by circumstances proved, so strong and intense as to produce the full certainty of death.

"In regard to the second branch of the case, by which we mean the traverse between the government and the prisoner as to the question of his guilty agency in the commission of the alleged murder; as to this question, the rule, is that the government are required, before they can claim a conviction, to prove by their evidence the guilt of the prisoner beyond any rational doubt. If, upon a full and fair consideration of all the evidence in the case, doubts remain in the minds of the jury, it is their duty to acquit. Upon this branch of the case, the doubts, however, which require an acquittal should be rational doubts. They are not doubts which may arise in a speculative mind, after the reason and judgment are thoroughly convinced by the evidence in the cause."

The defendant's counsel excepted to so much and such parts

of the charge and instructions given to the jury as submits to them to infer, presume and find, without direct proof, the death and the murder of the infant daughter of the defendant.

The question presented to us, therefore, is, whether there be a rule of law, in respect to the proof in cases of homicide, which does not permit a conviction without direct proof of the death, or of the violence or other act of the defendant which is alleged to have produced death.

If it be objected that such a rule may compel the acquittal of one whom the jury are satisfied is guilty, the answer is, that the rule, if it exists, must be regarded as part of the humane policy of the common law, which affirms that it is better that many guilty should escape than that one innocent should suffer; and that it may have its probable foundation in the idea that where direct proof is absent as to both the fact of death and of criminal violence capable of producing death, no evidence can rise to the degree of moral certainty that the individual is dead by criminal intervention, or even lead by direct inference to those results; and that where the fact of death is not certainly ascertained, all mere inculpatory moral evidence wants the key necessary for its satisfactory interpretation, and cannot be depended on to furnish more than probable results. It may be, also, that such a rule has some reference to the dangerous possibility that a general preconception of guilt, or a general excitement of popular feeling, may creep in to supply the place of evidence, if, upon other than direct proof of death or a cause of death, a jury are to be permitted, upon whatever evidence may be presented to them, competent on any part of the case, to pronounce a defendant guilty.

I proceed, therefore, to consider whether any such rule is to be found in the common law. Lord HALE says: "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead, for the sake of two cases—one mentioned in my Lord COKE's P. C., cap. 104, p. 232, a Warwickshire case; another, that happened in my remembrance, in Staffordshire, where A was long missing, and upon strong presumptions B was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found, whereupon B was indicted of murder, and convicted and executed, and within one year after A returned being, indeed, sent beyond sea by B, against his will, and so, though B justly de-

served death, yet he was really not guilty of that offence for which he suffered." (2 Hale's P. C., 290.) It forms part of the chapter in which he treats of "evidence requisite, or allowed by acts of parliament, and presumptive evidence." Considering the law of evidence, first in treason, requiring two witnesses, then upon indictment for murder against the mother of a bastard child, where by act of parliament the mother of such a child, concealing its death, was to suffer as in murder, unless she proved by one witness that the child was born dead, and next the subject of presumptive evidence, he says: "In some cases presumptive evidences go far to prove a person guilty, though there be no express proof of the fact to be committed by him; but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die." This observation he follows by a case illustrative of his meaning, where one was executed for stealing a horse, which was proved to have been stolen, the prisoner being found in possession of the horse, "a strong presumption that he stole him," and yet it afterwards appeared that another person stole the horse and that the prisoner's possession was innocent. He proceeds: "I would never convict any person for stealing the goods of a person unknown, merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods." Then follows the passage first cited, which is the earliest statement of the doctrine for which the defendant contends.

When this was written, a prisoner charged with murder or any inferior felony was neither allowed the advantage of sworn witnesses or the full aid of counsel, and it is therefore quite apparent upon the whole passage that Lord HALE was here stating, not what prudential principles ought to govern the action of individual jurors in weighing evidence, but what, acting as judge, and exercising the control which judges were then accustomed to exercise, he would govern them by.

The case cited in COKE was of an uncle who brought up his niece, whose heir at law he was. He correcting her on some occasion, she was heard to cry out, "Good uncle, kill me not," and afterwards disappeared and could not be found. He was arrested on suspicion, and, to avert this, produced as his niece another child of similar appearance. The imposition was detected, and he, being indicted, was on trial convicted on these circumstances, and

executed. The niece afterwards made her appearance, and was proved to be the true child. Lord COKE reports this case, as he says, to the end that judges, in case of life and death, judge not too hastily on bare presumption.

In Hindmarsh's case (2 Leach's Crown Law, 569), the indictment for murder of a ship captain contained two counts, one for killing by beating, the other for drowning. The fact happened at sea; a witness proved that he was awakened at midnight by a violent noise; that on reaching the deck, he saw the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards. Another witness proved that the prisoner proposed to one Atkins to kill the captain; and another proved that on the deck, near where the captain was seen, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood. Garrow, of counsel for the prisoner, contended, citing the passage from HALE, that the prisoner was entitled to be acquitted for want of proof of the death, as he might have been picked up by some other ship. He cited a case before Justice GOULD, where the mother and reputed father of a bastard child took it to the margin of a dock in Liverpool, stripped it and threw it in. The body of the child was not afterwards seen; and as the tide ebbed and flowed in the dock, the judge, observing to the jury that the tide might have carried out the living infant, directed them to acquit him. The court, which consisted of Sir JAMES MARRIOTT, Judge of Admiralty, Mr. Justice ASHURST, Baron HOTHAM, and others, admitted the general rule of law; and Mr. Justice ASHURST left it to the jury, on the evidence, to say whether the captain was not killed before his body was thrown into the sea. The jury found the fact to be so. The case came afterwards before all the judges, who held the conviction to be right, and the prisoner was executed.

BLACKSTONE says (4 Com., 358), all presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape than that one innocent suffer; and Sir MATTHEW HALE, in particular, lays down two rules most prudent and necessary to be observed: 1. Never to convict a man for stealing, &c.; and 2. Never to convict any person of murder or manslaughter, till at least the body be found dead.

In *Regina v. Hopkins* (8 C. & P., 591), a woman was indicted for the murder of her illegitimate child. It was born March twenty-



third, and sent to a nurse, where it remained till April seven, when the prisoner took it away, stating an intention to go to her father's. She was seen the next day at several times, the latest being at six in the evening, with the child in her arms on the way to her father's. Between eight and nine she arrived there without the child. The dead body of a child was found on the thirteenth, in a river near the place where she was last seen with her child, which upon proof of its age and appearance was shown not to be her child. Lord ABINGER, after stating the particulars of this latter proof, added, "with respect to the child which really was the child of the prisoner, she cannot by law be called upon either to account for it or say where it is, unless there be evidence to show that her child is actually dead," and directed an acquittal.

In the case of *Videtto* (1 Park. Cr. R., 609), WALWORTH, Cirt. J., says: "One rule which ought never to be departed from is, that no one should be convicted of murder upon circumstantial evidence, unless the body of the person supposed to have been murdered has been found, or there be other clear and irresistible proof that such person is actually dead."

It does not appear that this direction was material on that trial, and it is cited only to show how constantly the doctrine has been received as clear and undisputed law.

In the case of *Wilson* (3 Park. Cr. R., 207), the cook of the schooner *Eudora* was indicted for the murder of the captain upon Long Island Sound; after five months a body floated on shore, which the prosecution claimed was shown to be that of the murdered man. STRONG, J., who presided at the trial, charged the jury "that ordinarily there could be no conviction for murder until the body of the deceased was discovered. That there were several exceptions to the rule, however, as where the murder has been on the high seas, at a great distance from the shore, and the body had been thrown overboard, or where the body had been entirely consumed by fire, or so far that it was impossible to identify it. But, in the present case, the scene of the supposed tragedy was near the shore, and there was strong reason to suppose that if a murder had been committed, the body of the deceased would be discovered. The exception to the rule is, therefore, inapplicable, and the jury must be satisfied that the body discovered was that of the murdered captain, before they could convict the prisoner."

In *Tawell's case* (Wills' Cir. Ev., 3d ed., 181), Baron PARKE

told the jury that "the only fact which the law requires to be proved by direct and positive evidence is the death of the party by finding the body, or, when such proof is absolutely impossible, by circumstantial evidence leading closely to that result—as where a body was thrown overboard, far from land, when it is quite enough to prove that fact without producing the body."

These are the cases in which the rule contended for by the defendant has been recognized as the clearly acknowledged law regulating the production of evidence in cases of homicide. No case is to be found which has been determined the other way. That no more reported cases contain the rule, is to be accounted for on the ground that the doctrine has been universally acted on and acquiesced in, while it is equally certain that any case departing from the rule would not have escaped observation.

A great deal of strong general language has been used by judges in respect to the power of circumstantial evidence to afford sufficient ground to warrant convictions, and many instances of this have been cited and are relied on by the prosecution. Most of those expressions have been used, in answer to the position that circumstantial evidence ought not to be relied on to prove any part of the case for the prosecution. But I have not found any case in which a judge, speaking directly to the point here involved, has said that without direct evidence on either branch of the *corpus delicti* a conviction for murder could be allowed.

The cases contained in *The Theory of Presumptive Proof*, for a considerable time after its publication, formed the basis of repeated attacks upon the value of circumstantial evidence for any purpose of inculcation in criminal cases. It was to dispel this error that judges often had occasion, and sometimes took occasion, to vindicate its employment. But that the general language thus employed was not intended, by those who used it, to conflict with the rule for which the defendant in this case contends, is fairly to be inferred.

In Cowen & Hill's *Notes to Phillips* (vol. 1, 394), after a review of the cases contained in *The Theory of Presumptive Proof*, and sustaining in the strongest manner the general value and importance of circumstantial evidence against the attacks upon it, as well those contained in the work mentioned as those founded upon the cases which that work first collected, the authors say: "In these cases of homicide, the precaution of Lord HALE seems

to be enough for laying the foundation of circumstantial evidence—citing in terms the rule. A departure from this important suggestion, which is now universally acted upon, was a capital error in Miles' case, before cited from the above named work. The body being afterwards found, it plainly appeared that the death was accidental. The judge should have stopped the prosecution. In the two illustrative cases cited by HALE, one of the persons supposed to have been murdered was sent on a long sea voyage and the other had run away. The rule that the body must be found dead is adhered to with great strictness in the English courts."

No one was better qualified than Judge COWEN, both by long experience and great learning, to speak of what rules were universally acted on in the courts of England and of this country. It is quite plain, too, that his general remarks on the value of circumstantial evidence must in his own view have been consistent with the rule which he thus lays down and approves.

In the next place, I proceed to consider the principal cases relied on for the people.

Mr. Justice WASHINGTON, in *United States v. Johns*. (1 Wash. C. C. R., 363), says: "That the prisoner perpetrated the act, or directed or procured it to be done, positive evidence is not necessary. Circumstantial evidence is sufficient, and is often more persuasive to convince the mind of the existence of a fact than the positive evidence of a witness, who may be mistaken; whereas a concatenation and a fitness of many circumstances, made out by different witnesses, can seldom be mistaken or fail to elicit the truth. But then those circumstances should be strong in themselves, should each of them tend to throw light upon and to prove each other, and the result of the whole should be to leave no doubt upon the mind that the offence has been committed, and that the accused and no other could be the person who committed it." The defendant was on trial for casting away a ship. That auger holes had been found in her bottom, which nearly sunk her, was proved by pumping her out and bringing her to port. The whole question of fact was the personal guilt of the accused. The remarks are just; indeed they are cited by Judge COWEN with approbation in the same note before referred to, and are followed by his statement of the rule, in cases of homicide, as to proof of the fact of death.

The same remarks are applicable also to Jacobson's case (2 City Hall Recorder, 131, 143), where Mr. Justice LIVINGSTON is re-

ported to have said: "The rule in this court, even in capital cases, is, that should the circumstances of a case be sufficient to convince the mind and remove every rational doubt, the jury is bound to place as much reliance on such circumstances as on direct and positive proof, for facts and circumstances cannot lie." This was also in a case of casting away a ship, and the only question was of the personal guilt of the defendant. It was no way necessary for the judge's argument, nor required by fairness to the defendant, that he should stop to state an exception as to the fact of death in murder.

In the case of *Burdett* (4 Barn. & Ald., 164), the question was whether a libel had been published in a certain place; and the observations of the judges are of course to be construed with reference to the point before them. All the judges speak of the necessity of a resort to presumptive evidence, and recognize the fact that, even in cases of murder, a great part of the convictions rest upon that sort of evidence to establish the guilt of the accused; but *ABBOTT*, Ch. J., only notices that kind of proof in its application to the fact of death. Speaking of the cases of supposed murder mentioned by Lord *HALE*, which, as he says, have since operated as a caution to all judges, he observes: "In those cases there was no actual proof of the death of the person supposed to have been slain, and consequently no proof that the crime of murder had been committed." From nothing which is said or omitted to be said in that case can it be fairly inferred that any of the judges denied the correctness of the rule stated by Lord *HALE*. What was said by Mr. Justice *BEST* comes nearest to the purpose for which it was cited on the part of the people. He said: "Until it pleases Providence to give us means beyond those our present faculties afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is raised as to the *corpus delicti*, that it ought to be strong and cogent." The *corpus delicti*, in murder, is a compound fact, made up of death as result, and criminal agency of another person as means; and therefore, if he had been speaking of murder, he might have employed this expression without intending to deny the rule that as to one or the other branch of the crime there must be direct evidence. But it was in no way necessary, or conducive to the argument he had in hand, that he should be minutely accurate on the point before us, for, in the case of which

he was speaking, the *corpus delicti*, the publication of the libel by the defendant, was admitted, and the presumptive proof which he had sustained related only to the place of publication.

What was said by Mr. Justice PARK, in *Rex v. Thurtell*, tried for the murder of Weare, which is quoted in the opinion of Mr. Justice MASON, was said in a case where the body of the defendant had been found recently dead, and was intended to answer the address of Thurtell to the jury, which had mainly turned on certain cases which we read, exhibiting the fallibility of circumstantial evidence. (2 Chron. of Crime, Lond., 1841, 85.) It affords no inference that he denied the rule of Lord HALE.

In *United States v. Gilbert* (2 Sumn., 27), an indictment for robbery on the high seas, Judge STORY in summing up adverted to certain cases which had been cited to show the danger of relying on presumptive evidence, in capital cases, as sufficient proof of guilt. He says: "They are brought to establish these propositions on trials for murder: 1st. That there ought to be no conviction for murder unless the murdered body is actually found; 2d. That men have been convicted of murder on false testimony. The first proposition certainly cannot be admitted as correct, in point of common reason or of law, unless courts of justice are to establish a positive rule to screen persons from punishment who may be guilty of the most flagitious crimes. In the case of murders on the high seas the body is rarely if ever found, and a more complete encouragement and protection for the worst offences of this sort could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas." Strong as this language is, I find in it no support for the idea that, in the absence of any direct evidence showing that anybody has been killed, and accounting for the absence of the dead body, it is to be put to a jury to find, according to their belief, that a murder has or has not been committed.

The other cases cited for the prosecution, *People v. Thorn* (6 Law Rep., 54), *Commonwealth v. Harman* (4 Barr, 269), *State v. Turner* (1 Wright Ohio, 20), and *Commonwealth v. Webster* (5 Cush., 310), except that last mentioned, were cases in which the fact of death was clearly established by finding the body; and in Webster's case, the identification of the remains as those of Dr. Parkman was the vital fact on which the success of the prosecution depended.

I proceed to consider briefly what has been written by elementary writers on this subject.

Mr. STARKIE (1 Stark. Ev., 575), under the rule which he lays down, that it is essential that the circumstances should to a moral certainty actually exclude every hypothesis but the one proposed to be proved, says. "Hence results the rule in criminal cases, that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing, unless the *corpus delicti*, the fact that the crime has been actually perpetrated, be first established. So long as the least doubt exists as to the act, there can be no certainty as to the criminal agent. Hence, upon charges of homicide, it is an established rule that the accused shall not be convicted unless the death be first distinctly proved either by direct evidence of the fact or by inspection of the body—a rule warranted by melancholy experience of the conviction and execution of supposed offenders, charged with the murder of persons who survived their alleged murderers; as in the case of the uncle, cited by Sir EDWARD COKE and Lord HALE."

On a subsequent page of the same work, when speaking of the proof of the death of the person specified in the indictment as having been murdered, he says: "It has been laid down by Lord HALE as a rule of prudence in cases of murder, that, to warrant a conviction, proof should be given of the death, by evidence of the fact or the actual finding of the body. But although it be certain that no conviction ought to take place unless there be most full and decisive evidence as to the death, yet it seems that actual proof of the finding and identifying of the body is not absolutely essential. And it is evident that to lay down a strict rule to that extent might be productive of the most horrible consequences." (2 Stark. Ev., 710.) Hindmarsh's case is then stated by him, thus illustrating the meaning of the expressions he has just employed, and the allowable exposition of the terms of Lord HALE's rule.

Having finished the discussion of the proof of the *corpus delicti*, he proceeds: "When it has been clearly established that the crime of willful murder has been perpetrated, the important fact whether the prisoner was the guilty agent is, of course, for the consideration of the jury, under all the circumstances of the case." (Id., 719.) It is in this connection, and with reference, I think, mainly, if not exclusively, to this branch of the inquiry, that he observes that "it is essential to the security of mankind that juries should

convict, when they can do so safely and conscientiously, upon circumstantial evidence which excludes all reasonable doubt, and that it should be well known and understood that the secrecy with which crimes are committed will not secure impunity to the criminal." (Id., 720.) Specifying, under this head, among the topics of circumstantial evidence pertinent to the inquiry, the conduct of the prisoner in seeking for opportunities to commit the offence, or in using means to avert suspicion and remove material evidence, he adds: "The case cited by Lord COKE and Lord HALE is a melancholy instance to show how cautiously proof arising by inference from the conduct of the accused is to be received, when it is not satisfactorily proved by other circumstances that a murder has been committed; and even when satisfactory proof has been given of the death, it is still to be recollected that a weak, inexperienced and injudicious person will often, in hope of present relief, have recourse to deceit and misrepresentations." (Id., 720.)

Having explained himself fully as to proof of the *corpus delicti* in another place, it was not necessary, to avoid misconception, for him to inweave that distinction into this passage, and it ought not to be taken to qualify what has been before carefully stated. Indeed, his language, attentively considered, requires no modification, for he distinguishes between the proof of the murder—of both branches of the *corpus delicti*—and proof of the death alone.

In Russell on Crimes (vol. 1, 473) it is said: "It has been holden as a rule that no person should be convicted of murder, unless the body of the deceased has been found; and a very great judge says: 'I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body be found dead.' But this rule, it seems, must be taken with some qualifications; and circumstances may be sufficiently strong to show the fact of the murder, though the body has never been found."

The rule which is thus qualified is that which prohibits a conviction unless the body be found, not the rule stated by Lord HALE. This appears by what immediately follows in illustration, a statement of Hindmarsh's case, which the defendant's counsel admits to be correctly decided. In that case the violent noise which awakened the witness, the blood on the deck and the prisoner's clothes, the billet of wood lying by, and the actual casting into the sea, made a satisfactory case of proof under Lord HALE's rule.

GREENLEAF says (3 Greenl. Ev., § 30): "It is seldom that either the *corpus delicti* or the identity of the prisoner can be proved by direct testimony, and, therefore, the fact may lawfully be established by circumstantial evidence, provided it be satisfactory. Even in the case of homicide, though ordinarily there ought to be the testimony of persons who have seen and identified the body, yet this is not indispensably necessary in cases where the proof of death is so strong and intense as to produce the full assurance of moral certainty."

For this proposition, WILLS on Circumstantial Evidence (157, 162) is referred to, and Hindmarsh's case is cited as an example. Such judicial observations as are referred to, in the places cited in WILLS, were made by judges with reference to the further proofs of crime, after the fact of death had been fully established by direct and unequivocal evidence. The only case cited in which any relaxation of the rule—that the body must be found—has taken place, in Hindmarsh's, and that, as we have seen, stands upon satisfactory grounds, there being direct and unequivocal proof of what was done with the man or his body. He proceeds: "But it must not be forgotten that the books furnish deplorable cases of the conviction of innocent persons, from the want of sufficiently certain proofs, either of the *corpus delicti*, or of the identity of the prisoner. It is obvious that, on this point, no precise rule can be laid down, except that the evidence 'ought to be strong and cogent,' and that innocence should be presumed until the case is proved against the prisoner, in all its material circumstances, beyond any reasonable doubt." (3 Greenl. Ev., § 30.)

"The *corpus delicti*, or the fact that a murder has been committed, is so essential to be satisfactorily proved, that Lord HALE advises that no person be convicted of culpable homicide unless the fact were proved to have been done, or at least the body found dead. Without this proof, a conviction would not be warranted, though there were evidence of conduct of the prisoner exhibiting satisfactory indications of guilt. But the fact, as we have already seen, need not be directly proved, it being sufficient if it be established by circumstances so strong and intense as to produce the full assurance of moral certainty." (3 Greenl. Ev., § 131.)

"§ 132. The most positive and satisfactory evidence of the fact of death is the testimony of those who were present when it happened, or who, having been personally acquainted with the



deceased in his lifetime, have seen and recognized his body after life was extinct. This evidence seems to be required in the English House of Lords, in claims of peerage, and, *a fortiori*, a less satisfactory measure of proof ought not to be required in a capital trial.

“§ 133. But though it is necessary that the body of the deceased be satisfactorily identified, it is not necessary that this be proved by direct and positive evidence, if the circumstances be such as to leave no reasonable doubt of the fact. Where only mutilated remains have been found, it ought to be clearly and satisfactorily shown that they are the remains of a human being, and of one answering to the sex, age and description of the deceased; and the agency of the prisoner in their mutilation, or in producing the appearances found upon them, should be established.”

The question will be found further discussed in Best on Presumptions (271-276), Wharton's American Criminal Law (283-287), Wills on Circumstantial Evidence (156-170), and in Burrill on Circumstantial Evidence (678-680). The last writer states, as his conclusion, that “the fact of death, when the body cannot be found, may be proved by circumstances. It may be inferred, says Mr. WILLS, from such strong and unequivocal circumstances of presumption as render it morally certain, and leave no ground for reasonable doubt.” In illustration, Hindmarsh's case is again referred to, and, it may be assumed, to show what is meant by the expression so constantly used, “such strong and unequivocal circumstances of presumption as render the fact morally certain, and leave no ground for reasonable doubt.” He says further: “A dead body or its remains having been discovered and identified as that of the person charged to have been slain, and the basis of a *corpus delicti* being thus fully established, the next step in the process, and the one which serves to complete the proof of the indispensable preliminary fact, is to show that the death has been occasioned by the criminal act or agency of another person. This may always be done by means of circumstantial evidence, including that of the presumptive kind; and for this purpose, a much wider range of inquiry is allowed than in regard to the fundamental fact of death, and all the circumstances of the case, including facts of conduct on the part of the accused, may be taken into consideration. (Burr. on Cir. Ev., 682; Best on Presum., § 205; Wills' Cir. Ev., 168.)

If what is said by these writers is to be taken as intimating

their opinion that Lord HALE's rule may be departed from, I find no judicial authority warranting the departure. The rule is not founded in a denial of the force of circumstantial evidence, but in the danger of allowing any but unequivocal and certain proof that some one is dead to be the ground on which, by the interpretation of circumstances of suspicion, an accused person is to be convicted of murder.

We are of opinion that the judge, at the trial, erred, and that he should have directed an acquittal.

ROOSEVELT, J., dissented.

Judgment reversed and new trial ordered.

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### FELONIOUS HOMICIDE.

#### *Murder and Manslaughter.*

*Commonwealth v. Webster, 5 Cush. (Mass.) 295. (1850.)*

The defendant, professor of chemistry in Harvard University, was indicted for the murder of Dr. George Parkman of Boston.

The government introduced evidence, that Dr. George Parkman, quite peculiar in person and manners, and very well known to most persons in the city of Boston, left his home in Walnut street in Boston in the forenoon of the 23d of November, 1849, in good health and spirits; and that he was traced through various streets of the city until about a quarter before two o'clock of that day, when he was seen going towards and about to enter the medical college: That he did not return to his home: That on the next day a very active, particular, and extended search was commenced in Boston and the neighboring towns and cities, and continued until the 30th of November; and that large rewards were offered for information about Dr. Parkman: That on the 30th and 31st of November, certain parts of a human body were discovered, in and about the defendant's laboratory in the medical college; and a great number of fragments of human bones and certain blocks of mineral teeth, imbedded in slag and cinders, together with small quantities of gold, which had been melted, were found in an assay furnace of the laboratory: That in consequence of some of these discoveries the defendant was arrested on the evening of the 30th of November: That the parts of a human body so found resembled

in every respect the corresponding portions of the body of Dr. Parkman, and that among them all there were no duplicate parts; and that they were not the remains of a body which had been dissected: That the artificial teeth found in the furnace were made for Dr. Parkman by a dentist in Boston in 1846, and refitted to his mouth by the same dentist a fortnight before his disappearance: That the defendant was indebted to Dr. Parkman on certain notes, and was pressed by him for payment; that the defendant had said that on the 23d of November, about nine o'clock in the morning, he left word at Dr. Parkman's house, that if he would come to the medical college at half past one o'clock on that day, he would pay him; and that, as he said, he accordingly had an interview with Dr. Parkman at half past one o'clock on that day, at his laboratory in the medical college: That the defendant then had no means of paying, and that the notes were afterwards found in his possession.

SHAW, C. J.:

Homicide, of which murder is the highest and most criminal species, is of various degrees, according to circumstances. The term, in its largest sense, is generic, embracing every mode by which the life of one man is taken by the act of another. Homicide may be lawful or unlawful; it is lawful when done in lawful war upon an enemy in battle; it is lawful when done by an officer in the execution of justice upon a criminal, pursuant to a proper warrant. It may also be justifiable, and of course lawful, in necessary self-defence. But it is not necessary to dwell on these distinctions; it will be sufficient to ask attention to the two species of criminal homicide, familiarly known as murder and manslaughter.

In seeking for the sources of our law upon this subject, it is proper to say, that whilst the statute law of the commonwealth declares (Rev. Sts. c. 125, § 1,) that "Every person who shall commit the crime of murder shall suffer the punishment of death for the same;" yet it nowhere defines the crimes of murder or manslaughter, with all their minute and carefully-considered distinctions and qualifications. For these, we resort to that great repository of rules, principles, and forms, the common law. This we commonly designate as the common law of England; but it might now be properly called the common law of Massachusetts.

It was adopted when our ancestors first settled here, by general consent. It was adopted and confirmed by an early act of the provincial government, and was formally confirmed by the provision of the constitution (ch. 6, art. 6,) declaring that all the laws which had theretofore been adopted, used, and approved, in the province or state of Massachusetts bay, and usually practised on in the courts of law, should still remain and be in full force until altered or repealed by the legislature. So far, therefore, as the rules and principles of the common law are applicable to the administration of criminal law, and have not been altered and modified by acts of the colonial or provincial government or by the state legislature, they have the same force and effect as laws formally enacted.

By the existing law, as adopted and practised on, unlawful homicide is distinguished into murder and manslaughter.

Murder, in the sense in which it is now understood, is the killing of any person in the peace of the commonwealth, with *malice aforethought*, either express or implied by law. Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances, as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

Manslaughter is the unlawful killing of another without malice; and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which in tenderness for the frailty of human nature the law considers sufficient to palliate the criminality of the offence; or involuntary, as when the death of another is caused by some unlawful act, not accompanied by any intention to take life.

From these two definitions, it will be at once perceived, that the characteristic distinction between murder and manslaughter is malice, express or implied. It therefore becomes necessary, in every case of homicide proved, and in order to an intelligent inquiry into the legal character of the act, to ascertain with

some precision the nature of legal malice, and what evidence is requisite to establish its existence.

Upon this subject, the rule as deduced from the authorities is, that the implication of malice arises in every case of intentional homicide; and, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide, and the circumstances attending it. If there are, in fact, circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed, tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. This rule is founded on the plain and obvious principle, that a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts. Therefore, when one person assails another violently with a dangerous weapon, likely to kill and which does in fact destroy the life of the party assailed, the natural presumption is, that he intended death or other great bodily harm; and, as there can be no presumption of any proper motive or legal excuse for such a cruel act, the consequence follows, that, in the absence of all proof to the contrary, there is nothing to rebut the presumption of malice. On the other hand, if death, though wilfully intended, was inflicted immediately after provocation given by the deceased, supposing that such provocation consisted of a blow or an assault, or other provocation on his part, which the law deems adequate to excite sudden and angry passion and create heat of blood, this fact rebuts the presumption of malice; but still, the homicide being unlawful, because a man is bound to curb his passions, is criminal, and is manslaughter.

In considering what is regarded as such adequate provocation, it is a settled rule of law, that no provocation by words only, however opprobrious, will mitigate an intentional homicide, so as to reduce it to manslaughter. Therefore, if upon provoking language given, the party immediately revenges himself by the use of a dangerous and deadly weapon likely to cause death, such as a pistol discharged at the person, a heavy bludgeon, an axe, or a knife; if death ensues, it is a homicide not mitigated to man-

slaughter by the circumstances, and so is homicide by malice aforethought, within the true definition of murder. It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words "malice aforethought," in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design, in contradistinction to accident and mischance.

In speaking of the use of a dangerous weapon, and the mode of using it upon the person of another, I have spoken of it as indicating an intention to kill him, or *do him great bodily harm*. The reason is this. Where a man, without justification or excuse, causes the death of another by the intentional use of a dangerous weapon likely to destroy life, he is responsible for the consequences, upon the principle already stated, that he is liable for the natural and probable consequences of his act. Suppose, therefore, for the purpose of revenge, one fires a pistol at another, regardless of consequences, intending to kill, maim, or grievously wound him, as the case may be, without any definite intention to take his life; yet, if that is the result, the law attributes the same consequences to homicide so committed, as if done under an actual and declared purpose to take the life of the party assailed.

I propose to verify and illustrate these positions, by reading a few passages from a work of good authority on this subject, a work already cited at the bar, *East's Pleas of the Crown*, c 5, §§ 2, 4, 12, 19, 20.

"Murder is the voluntary killing of any person of malice pre-pense or aforethought, either express or implied by law; the sense of which word *malice* is not only confined to a particular ill-will to the deceased, but is intended to denote, as Mr. Justice Foster expresses it, an action flowing from a wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent upon mischief. And therefore malice is implied from any deliberate, cruel act against another, however sudden." § 2.

“Manslaughter is principally distinguishable from murder in this; that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting; and, the act being imputed to the infirmity of human nature, the correction ordained for it is proportionately lenient.” § 4.

“The implication of malice arises in every instance of homicide amounting, in point of law, to murder; and in every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him.” § 12.

“Whenever death ensues from sudden transport of passion or heat of blood, if upon a reasonable provocation and without malice, or if upon sudden combat, it will be manslaughter; if without such provocation, or the blood has had reasonable time or opportunity to cool, or there be evidence of express malice, it will be murder.” § 19.

“Words of reproach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder; nor are contemptuous or insulting actions or gestures, without an assault upon the person; nor is any trespass against lands or goods. This rule governs every case, where the party killing upon such provocation made use of a deadly weapon, or otherwise manifested an intention to kill, or to do some great bodily harm. But if he had given the other a box on the ear, or had struck him with a stick, or other weapon *not likely to kill*, and had unluckily and against his intention killed him, it had been but manslaughter.” § 20.

The true nature of manslaughter is, that it is homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection; and if, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood or violence of anger, and not through malice, or that cold-blooded desire of revenge which more properly constitutes the feeling, emotion, or passion of malice.

The same rule applies to homicide in mutual combat, which is attributed to sudden and violent anger occasioned by the combat, and not to malice. When two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up in which blows are given on both sides, without much regard to who is the assailant, it is a mutual combat. And if no unfair advantage is taken in the outset, and the occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in heat of blood; and though not excusable, because a man is bound to control his angry passions, yet it is not the higher offence of murder.

We have stated these distinctions, not because there is much evidence in the present case which calls for their application, but that the jury may have a clear and distinct view of the leading principles in the law of homicide. There seems to have been little evidence in the present case that the parties had a contest. There is some evidence tending to show the previous existence of angry feelings; but unless these feelings resulted in angry words, and words were followed by blows, there would be no proof of heat of blood in mutual combat, or under provocation of an assault, on the one side or the other; and the proof of the defendant's declarations, as to the circumstances under which the parties met and parted, as far as they go, repel the supposition of such a contest.

With these views of the law of homicide, we will proceed to the further consideration of the present case. The prisoner at the bar is charged with the wilful murder of Dr. George Parkman. This charge divides itself into two principal questions, to be resolved by the proof: first, whether the party alleged to have been murdered came to his death by an act of violence inflicted by any person; and if so, secondly, whether the act was committed by the accused.

Under the first head we are to inquire and ascertain, whether the party alleged to have been slain is actually dead; and, if so, whether the evidence is such as to exclude, beyond reasonable doubt, the supposition that such death was occasioned by accident or suicide, and to show that it must have been the result of an act of violence.

When the dead body of a person is found, whose life seems to have been destroyed by violence, three questions naturally arise.



Did he destroy his own life? Was his death caused by accident? Or was it caused by violence inflicted on him by others? In most instances, there are facts and circumstances surrounding the case, which, taken in connection with the age, character, and relations of the deceased, will put this beyond doubt. It is with a view to this, and in consequence of the high value which the law places upon the life of every individual under its protection, that provision is made for a prompt inquiry into such cases, prior to any question of guilt or innocence. The high and anxious regard of the law, for the protection and security of the life of the subject, pervades its whole system; and that upon the principles of simple humanity, without reference to the condition or circumstances of individuals. Indeed, you must have perceived, from the whole course of this trial, the extreme tenderness of the law for the rights of human life; as well as the life of the deceased, whose death is the subject of this trial, as that of the prisoner, whose own life is put in jeopardy by it. Hence, in case of a sudden and violent death, a coroner's inquest is provided, in order to an inquiry into its true cause, whilst the facts are recent, and the circumstances unchanged. If, on such an inquiry, made by an officer appointed for the purpose, and by a jury acting upon evidence given on oath, it satisfactorily appears that the deceased came to his death by accident or a visitation of providence, the result will have a strong tendency to allay unjustifiable suspicion, and to satisfy and tranquillize the feelings of the vicinity and of the community at large, always deeply interested in such an event. But if, as in the present case, the result of such an early inquiry tends to fasten suspicion on any individual as the guilty cause, then it naturally leads to other proceedings which may vindicate the law, and bring the suspected party to trial, and, if found guilty, to punishment.

The importance of this inquiry into the circumstances of a supposed violent death, and of collecting and preserving the proofs of them, will appear from the further consideration of the present case. It is one where the first important and leading fact, proved by uncontested evidence, is, that the person alleged to have been slain, Dr. Parkman, suddenly disappeared from his family and home on Friday the 23d of November last, without any cause known to them, and was never afterwards seen. The theory upon which the prosecution is founded, and to establish which evidence

has been laid before you, is, that he was deprived of life in the afternoon of the day mentioned, under such circumstances as lead to a strong belief, that his death was caused by an act of violence and by human agency.

This case is to be proved, if proved at all, by circumstantial evidence; because it is not suggested that any direct evidence can be given, or that any witness can be called to give direct testimony, upon the main fact of the killing. It becomes important, therefore, to state what circumstantial evidence is; to point out the distinction between that and positive or direct evidence; and to give some idea of the mode in which a judicial investigation is to be pursued by the aid of circumstantial evidence.

The distinction, then, between direct and circumstantial evidence, is this. Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or force of the evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death, and of course that no one can be called to testify to it; is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved of so conclusive a character, as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act, in relation to their most important concerns. It would be injurious to the best interests of society, if such proof could not avail in judicial proceedings. If it was necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly undetected and unpunished?

The necessity, therefore, of resorting to circumstantial evidence, if it is a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men, conscious of criminal purposes, and about the execution of criminal acts, seek the security of secrecy and darkness. It is therefore necessary to use all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions; and, thanks to a beneficent providence, the laws of nature and the relations of things to each other are so linked and combined to-

gether, that a medium of proof is often thereby furnished, leading to inferences and conclusions as strong as those arising from direct testimony.

On this subject, I will once more ask attention to a remark in the work already cited, East's Pleas of the Crown, *c* 5, § 11. "Perhaps," he says, "strong circumstantial evidence, in cases of crimes like this, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming together the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous."

Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is, that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done, and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood.

But, in a case of circumstantial evidence where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which by experience have been found so associated with the fact in question, that in the relation of cause and effect, they lead to a satisfactory and certain conclusion; as when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell; and, from the form and number of the footprints, it can be determined with equal certainty, whether they are those of a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to

weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.

From this view, it is manifest, that great care and caution ought to be used in drawing inferences from proved facts. It must be a fair and natural, and not a forced or artificial conclusion; as when a house is found to have been plundered, and there are indications of force and violence upon the windows and shutters, the inference is that the house was broken open, and that the persons who broke open the house plundered the property. It has sometimes been enacted by positive law, that certain facts proved shall be held to be evidence of another fact; as where it is provided by statute, that if the mother of a bastard child gives no notice of its expected birth and is delivered in secret, and afterwards is found with the child dead, it shall be presumed that it was born alive and that she killed it. This is a forced and not a natural presumption, prescribed by positive law, and not conformable to the rule of the common law. The common law appeals to the plain dictates of common experience and sound judgment; and the inference to be drawn from the facts must be a reasonable and natural one, and, to a moral certainty, a certain one. It is not sufficient that it is probable only; it must be reasonably and morally certain.

The next consideration is, that each fact which is necessary to the conclusion must be distinctly and independently proved by competent evidence. I say, every fact necessary to the conclusion; because it may and often does happen, that, in making out a case on circumstantial evidence, many facts are given in evidence, not because they are necessary to the conclusion sought to be proved, but to show that they are consistent with it and not repugnant, and go to rebut any contrary presumption. As in the present case, it was testified by a witness, that, the day before the alleged homicide, he saw Dr. Parkman riding through Cambridge and inquiring for Dr. Webster's house; this evidence had a slight tendency to show that he was then urgently pressing his claim; but not being necessary to the establishment of the main fact, if the witness was mistaken in the time or in the fact itself, such failure of proof would not prevent the inference from

other facts, if of themselves sufficient to warrant it. The failure of such proof does not destroy the chain of evidence; it only fails to give it that particular corroboration, which the fact, if proved, might afford.

So to take another instance arising out of the evidence in the present case. The fact of the identity of the body of the deceased with that of the dead body, parts of which were found at the medical college, is a material fact, necessary to be established by the proof. Some evidence has been offered, tending to show, that the shape, size, height, and other particulars respecting the body, parts of which were found and put together, would correspond with those of the deceased. But inasmuch as these particulars would also correspond with those of many other persons in the community, the proof would be equivocal and fail in the character of conclusiveness upon the point of identity. But other evidence was then offered, respecting certain teeth found in the furnace, designed to show that they were the identical teeth prepared and fitted for Dr. Parkman. Now, if this latter fact is satisfactorily proved, and if it is further proved to a reasonable certainty, that the limbs found in the vault and the burnt remains found in the furnace were parts of one and the same dead body, this would be a coincidence of a conclusive nature to prove the point sought to be established; namely, the fact of identity. Why, then, it may be asked, is the evidence of height, shape, and figure of the remains found, given at all? The answer is, because it is proof of a fact not repugnant to that of identity, but consistent with it, and may tend to rebut any presumption that the remains were those of any other person; and therefore, to some extent, aid the proof of identification. The conclusion must rest upon a basis of facts proved, and must be the fair and reasonable conclusion from all such facts taken together.

The relations and coincidences of facts with each other from which reasonable inferences may be drawn, are some of a physical or mechanical, and others of a moral nature. Of the former, some are so decisive as to leave no doubt; as where human footprints are found on the snow (to use an illustration already adduced), the conclusion is certain, that a person has passed there; because we know, by experience, that that is the mode in which such footprints are made. A man is found dead, with a dagger-wound in his breast; this being the fact proved, the conclusion is, that his

death was caused by that wound, because we know that it is an adequate cause of death, and no other cause is apparent.

We may also take an instance or two from actual trials. A recent case occurred in this court, where one was indicted for murder by stabbing the deceased in the heart, with a dirk-knife. There was evidence tending to show that the prisoner had possession of such a knife on the day of the homicide. On the next morning, the handle of a knife, with a small portion of the blade remaining, was found in an open cellar, near the spot. Afterwards, upon a *post mortem* examination of the deceased, the blade of a knife was found broken in his heart, causing a wound in its nature mortal. Some of the witnesses testified to the identity of the handle, as that of the knife previously in the possession of the accused. No one, probably, could testify to the identity of the blade. The question, therefore, still remained, whether that blade belonged to that handle. Now, when these pieces came to be placed together, the toothed edges of the fracture so exactly fitted each other, that no person could doubt that they had belonged together; because, from the known qualities of steel, two knives could not have been broken in such a manner as to produce edges that would so precisely match.

So, an instance is mentioned of a trial before lord Eldon, when a common-law judge, where the charge was of murder with a pistol. There was much evidence tending to show that the accused was near the place at the time, and raising strong suspicions that he was the person who fired the pistol; but it fell short of being conclusive,—of fastening the charge upon the accused. The surgeon had stated in his testimony, that the pistol must have been fired near the body, because the body was blackened, and the wad found in the wound. It was asked, by the judge, if he had preserved that wad; he said he had, but had not examined it. On being requested to do so, he unrolled it carefully, and on an examination it was found to consist of paper, constituting part of a printed ballad; and the corresponding part of the same ballad,—as shown by the texture of the paper and the purport and form of stanza of the two portions,—was found in the pocket of the accused. This tended to identify the defendant as the person who loaded and fired the pistol.

These are cases where the conclusion is drawn from known relations and coincidences of a physical character. But there are

those of a moral nature, from which conclusions may as legitimately be drawn. The ordinary feelings, passions, and propensities under which parties act, are facts known by observation and experience; and they are so uniform in their operation, that a conclusion may be safely drawn, that if a person acts in a particular manner he does so under the influence of a particular motive. Indeed, this is the only mode in which a large class of crimes can be proved. I mean crimes, which consist not merely in an act done, but in the motive and intent with which they are done. But this intent is a secret of the heart, which can only be directly known to the searcher of all hearts; and if the accused makes no declaration on the subject, and chooses to keep his own secret, which he is likely to do if his purposes are criminal, such criminal intent may be inferred, and often is safely inferred, from his conduct and external acts.

A few other general remarks occur to me upon this subject, which I will submit to your consideration. Where, for instance, probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered,—though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution.

To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion, without just cause, on other persons: all or any of which tend somewhat to prove consciousness of guilt, and, when proved, to exert an influence against the accused. But this consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception

in the hope of avoiding the force of such proofs. Such was the case often mentioned in the books, and cited here yesterday, of a man convicted of the murder of his niece, who had suddenly disappeared under circumstances which created a strong suspicion that she was murdered. He attempted to impose on the court by presenting another girl as the niece. The deception was discovered and naturally operated against him, though the actual appearance of the niece alive, afterwards, proved conclusively that he was not guilty of the murder.

One other general remark on the subject of circumstantial evidence is this; that inferences drawn from independent sources, different from each other, but tending to the same conclusion, not only support each other, but do so with an increased weight. To illustrate this, suppose the case just mentioned of the wad of a pistol consisting of part of a ballad, the other part being in the pocket of the accused; it is not absolutely conclusive, that the accused loaded and wadded the pistol himself; he might have picked up the piece of paper in the street. But suppose that by another and independent witness it were proved, that that individual purchased such a ballad at his shop; and further, from another witness, that he purchased such a pistol at another shop. Here are circumstances from different and independent sources, bearing upon the same conclusion, to wit, that the accused loaded and used the pistol; and they, therefore, have an increased weight in establishing the proof of the fact.

I will conclude what I have to say on this subject, by a reference to a few obvious and well-established rules, suggested by experience, to be applied to the reception and effect of circumstantial evidence.

The first is, that the several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred; and they are to be proved by competent evidence, and by the same weight and force of evidence, as if each one were itself the main fact in issue. Under this rule, every circumstance relied upon as material is to be brought to the test of strict proof; and great care is to be taken in guarding against feigned and pretended circumstances, which may be designedly contrived and arranged, so as to create or divert suspicion and prevent the discovery of the truth. These, by care and vigilance, may generally be detected, because things are so



ordered by providence,—events and their incidents are so combined and linked together,—that real occurrences leave behind them vestiges by which, if carefully followed, the true character of the occurrences themselves may be discovered. A familiar instance is, where a person has been slain by the hands of others, and circumstances are so arranged as to make it appear that the deceased committed suicide. In a case recorded as having actually occurred, the print of a bloody hand was discovered on the deceased. On examination, however, it was the print of a left hand upon the left hand of the deceased. It being impossible that this should have been occasioned by the deceased herself, the print proved the presence and agency of a third person, and excluded the supposition of suicide. So where a person was found dead, shot by a pistol-ball, and a pistol belonging to himself was found in his hand, apparently just discharged; indicating death by suicide. Upon further examination, it appearing that the ball which caused the mortal wound was too large for that pistol, the conclusion was inevitable, that suicide in the mode suggested must have been impossible.

The next rule to which I ask attention is, that all the facts proved must be consistent with each other, and with the main fact sought to be proved. When a fact has occurred, with a series of circumstances preceding, accompanying, and following it, we knew that these must all have been once consistent with each other; otherwise the fact would not have been possible. Therefore, if any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inference depends: and, however plausible or apparently conclusive the other circumstances may be, the charge must fail.

Of this character is the defence usually called an *alibi*; that is, that the accused was *elsewhere* at the time the offence is alleged to have been committed. If this is true,—it being impossible that the accused should be in two places at the same time,—it is a fact inconsistent with that sought to be proved, and excludes its possibility.

This is a defence often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it, is to be subjected to a rigid scrutiny, because, without attempting to control or rebut the evidence of facts sustaining the charge, it attempts

to prove affirmatively another fact wholly inconsistent with it; and this defence is equally available, if satisfactorily established, to avoid the force of positive, as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defence, it is obvious, that all testimony, tending to show that the accused was in another place at the time of the offence, is in direct conflict with that which tends to prove that he was at the place where the crime was committed, and actually committed. In this conflict of evidence, whatever tends to support the one, tends in the same degree to rebut and overthrow the other; and it is for the jury to decide where the truth lies.

Another rule is, that the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty, that the accused, and no one else, committed the offence charged. It is not sufficient that they create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential, therefore, that the circumstances taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. The evidence must establish the *corpus delicti*, as it is termed, or the offence committed as charged; and, in case of homicide, must not only prove a death by violence, but must, to a reasonable extent, exclude the hypothesis of suicide, and a death by the act of any other person. This is to be proved beyond reasonable doubt.

Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt

remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.

In every criminal prosecution, two things must concur; first, a good and sufficient indictment in which the criminal charge is set forth; and, secondly, such charge must be established by the legal proof. The sufficiency of the indictment in substance and form is a matter of law, upon which, if drawn in question, it is the duty of the court to give an opinion. The general rule is, that no person shall be held to answer to a criminal charge, until the same is fully and plainly, substantially and formally, described to him. A good indictment, therefore, is necessary, independent of proof.

This indictment contains four counts, which are four different modes in which the homicide is alleged to have been committed.

To a person unskilled and unpractised in legal proceedings, it may seem strange that several modes of death, inconsistent with each other, should be stated in the same document. But it is often necessary; and the reason for it, when explained, will be obvious. The indictment is but the charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that the homicide was committed, and yet the evidence before them may leave it somewhat doubtful as to the mode of death; but, in order to meet the evidence as it may finally appear, they are very properly allowed to set out the mode in different counts; and then if any one of them is proved, supposing it to be also legally formal, it is sufficient to support the indictment.

Take the instance of a murder at sea; a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homi-

cide by the blow, or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third alleging a death by the joint result of both causes combined.

It may perhaps be supposed, that, in the long and melancholy history of criminal jurisprudence, a precedent can be found for every possible mode in which a violent death can be caused; and it is safer to follow precedents. It is true that these precedents are numerous and various; but it is not true, that, amidst new discoveries in art and science and the powers of nature, new modes of causing death may not continually occur. The powers of ether and chloroform are of recent discovery. Suppose a person should be forcibly or clandestinely held, and those agents applied to his mouth till insensibility and death ensue. Though no such instance ever occurred before, the guilty agent could not escape.

Of course, I do not mean to intimate that these supposed agencies were used in the present instance, but allude to them simply by way of illustration. But, if such or any similar new modes of occasioning death may have been adopted, they are clearly within the law. The rules and principles of the common law, just as when applied to steamboats and locomotives, though these have come into existence long since those principles were established, are broad and expansive enough to embrace all new cases as they arise. If, therefore, a homicide is committed by any mode of death, which, though practised for the first time, falls within these principles, and it is charged in the indictment with as much precision and certainty as the circumstances of the case will allow, it comes within the scope of the law and is punishable.

The principle is well stated in East's Pleas of the Crown, *c. 5*, § 13:—"The manner of procuring the death of another with malice is, generally speaking, no otherwise material than as the degree of cruelty or deliberation with which it is accompanied may in conscience enhance the guilt of the perpetrator; with this reservation, however, that malice must be of corporal damage to the party; and, therefore, working upon the fancy of another, or treating him harshly or unkindly, by which he dies of fear or grief, is not such a killing as the law takes notice of; but he who wilfully and deliberately does any act, which apparently endangers another's life and thereby occasions his death, shall, unless he clearly prove the contrary, be adjudged to kill him of malice

prepenſe.” This, the author proceeds to illuſtrate by a number of remarkable and peculiar caſes.

In looking at this indictment, we find that the firſt count, after the uſual preamble, charges an aſſault and a mortal wound by ſtabbing with a knife; the ſecond, by a blow on the head with a hammer; and the third, by ſtriking, kicking, beating, and throwing on the ground.

The fourth and laſt count, which is ſomewhat new, it will be neceſſary to examine more particularly. [Here the chief juſtice read the fourth count, as inſerted on page 296.]

The court are all of opinion, after ſome conſideration, that this is a good count in the indictment. From the neceſſity of the caſe, we think it muſt be ſo, becauſe caſes may be imagined where the death is proved, and even where remains of the deceased are diſcovered and identified, and yet they may afford no certain evidence of the form in which the death was occaſioned; and then we think it is proper for the jury to ſay, that it is by means to them unknown.

We have already ſeen that a death occaſioned by grief or terror cannot in law be deemed murder. Murder muſt be committed by an act applied to or affecting the perſon, either directly, as by inflicting a wound or laying poiſon; or indirectly, as by expoſing the perſon to a deadly agency or influence, from which death enſues. Here the count charges an aſſault upon the deceased (a technical term well underſtood in the law, implying force applied to or directed towards the perſon of another), in ſome way and manner, and by ſome means, inſtruments, and weapons, to the jury unknown; and that the defendant did thereby wilfully and maliciously deprive him of life.

The rules of law require the grand jury to ſtate their charge with as much certainty as the circumſtances of the caſe will permit; and, if the circumſtances will not permit a fuller and more precise ſtatement of the mode in which the death is occaſioned, this count conforms to the rules of law. I am therefore inſtructed by the court to ſay, that, if you are ſatisfied upon the evidence, that the defendant is guilty of the crime charged, this form of indictment is ſufficient to ſuſtain a conviction.

We now come to conſider that ground of defence on the part of the defendant which has been denominated, not perhaps with precise legal accuracy, an *alibi*; that is, that the deceased was

seen elsewhere out of the medical college after the time, when, by the theory of the proof on the part of the prosecution, he is supposed to have lost his life at the medical college. It is like the case of an *alibi* in this respect, that it proposes to prove a fact which is repugnant to and inconsistent with the facts constituting the evidence on the other side, so as to control the conclusion, or at least render it doubtful, and thus lay the ground of an acquittal. And the court are of opinion that this proof is material; for, although the time alleged in the indictment is not material, and an act done at another time would sustain it, yet in point of evidence it may become material; and in the present case, as all the circumstances shown on the other side, and relied upon as proof, tend to the conclusion that Dr. Parkman was last seen entering the medical college, and that he lost his life therein, if at all, the fact of his being seen elsewhere afterwards would be so inconsistent with that allegation, that, if made out by satisfactory proof, we think it would be conclusive in favor of the defendant.

Both are affirmative facts; and the jury are to decide upon the weight of the evidence. When you are called upon to consider the proof of any particular fact, you will consider the evidence which sustains it in connection with that which makes the other way, and be governed by the weight of proof. Proof which would be quite sufficient to sustain a proposition, if it stood alone, may be encountered by such a mass of opposite proof as to be quite overbalanced by it.

In the ordinary case of an *alibi*, when a party charged with a crime attempts to prove that he was in another place at the time, all the evidence tending to prove that he committed the offence tends in the same degree to prove that he was at the place when it was committed. If, therefore, the proof of the *alibi* does not outweigh the proof that he was at the place when the offence was committed, it is not sufficient.

There is one other point remaining to which it is necessary to ask your attention; and that is the evidence of character. There are cases of circumstantial evidence, where the testimony adduced for and against a prisoner is nearly balanced, in which a good character may be very important to a man's defence. A stranger, for instance, may be placed under circumstances tending to render him suspected of larceny or other lesser crime. He may show, that, notwithstanding these suspicious circumstances, he is

esteemed to be of perfectly good character for honesty in the community where he is known: and that may be sufficient to exonerate him. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience; it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind; that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect.

But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime like this of murder to prove a high character, and, by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character.

Defendant was found guilty and sentenced to death. While in prison after the trial he confessed to the killing of Parkman. It seems Dr. Parkman called at the medical building at the appointed time and demanded pay of Webster. Words passed between them, and Webster in a fit of passion struck Parkman with a stick of wood and killed him. The body was dissected and disposed of by chemicals and fire. The friends of Professor Webster made great efforts to secure a pardon, but to no avail, for at the appointed time the sentence was carried out.

*Wellar v. People, 30 Mich. 16. (1874.)*

CAMPBELL, J.:

Plaintiff in error was convicted of the murder of Margaret Campbell by personal violence committed on July 25, 1873. They had lived together for several months, and on the occasion of her death she had been out on an errand of her own in the neighborhood, and on coming back into the house entered the front door of the bar-room, and fell, or was knocked down upon the floor. While on the floor there was evidence tending to show that Wellar ordered her to get up, and kicked her, and that he drew her from the bar-room through the dining-room into a bed room, where he left her, and where she afterwards died. The injury of which she died was inflicted on her left temple, and the evidence does not seem to have been clear how she received it or at what specific time. It was claimed by the prosecution to have been inflicted by a blow when she first came in, and if not, then by a blow or kick afterwards. All of the testimony is not returned, and the principal questions arise out of rulings which depend on the assumption that the jury might find that her death was caused by some violent act of Wellar's; which they must have done to convict him. There can be no question but that, if she so came to her death, he was guilty of either murder or manslaughter. The complaint made against the charge is, that a theory was put to the jury on which they were instructed to find as murder what would, or at least might be, manslaughter.

There was no proof tending to show the use of any weapon, and, if we may judge, from the charge, the prosecution claimed the fatal injury came from a blow of Wellar's fist, given as she entered the house. The judge seems to have regarded it as shown by a preponderance of proof, that the injury was visible when she was in the bar-room, and that the principal dispute was as to how it was caused, whether by a blow, or kick, or by accident. It also appears that, if inflicted in that room, it did not produce insensibility at the time, if inflicted before the prisoner dragged her into the bed room. It does not appear from the case at what hour she died.

It may be proper to remark that while it is not desirable to



introduce all the testimony into a bill of exceptions in a criminal case, it is important to indicate in some way the whole chain of facts which the evidence tends to prove. Without this we cannot fully appreciate the relations of many of the rulings, or know what instructions may be necessary to be sent down to the court below. The bill before us is full upon some things, but leaves out some things which it would have been better to include.

Upon any of the theories presented, there is no difficulty in seeing that if Wellar killed the deceased, and if he distinctly intended to kill her, his crime was murder. It is not claimed on his behalf that there was any proof which could reduce the act to manslaughter if there was a specific design to take life. Upon this the charge was full and pointed, and is not complained of. There was no claim that he had been provoked in such a way or to such an extent as to mitigate intentional slaying to anything below one of the degrees of murder.

But it is claimed that, although the injury given was fatal, yet, if not intended to produce any such results, it was of such a character that the jury might, and properly should, have considered it as resting on different grounds from those which determine responsibility for acts done with deadly weapons used in a way likely to produce dangerous consequences. But the charge of the court did not permit them to take that view.

It will be found by careful inspection of the charge, that the court specifically instructed the jury, that if Wellar committed the homicide at all, it would be murder, and not manslaughter, unless it was committed under such extreme provocation as is recognized in the authorities as sufficient to reduce intentional and voluntary homicide committed with a deadly weapon to that degree of crime. And in this connection the charge further given that if the intent of the respondent was to commit bodily harm, he was responsible for the result, because he acted willfully and maliciously in doing the injury necessarily led to a conviction of murder, because there was no pretense of any provocation of that kind.

Manslaughter is a very serious felony, and may be punished severely. The discretionary punishment for murder in the second degree comes considerably short of the maximum punishment for manslaughter. But the distinction is a vital one, resting chiefly on the greater disregard of human life shown in the higher crime.

And in determining whether a person who has killed another without meaning to kill him is guilty of murder or manslaughter, the nature and extent of the injury or wrong which was actually intended, must usually be of controlling importance.

It is not necessary in all cases that one held for murder must have intended to take the life of the person he slays by his wrongful act. It is not always necessary that he must have intended a personal injury to such person. But it is necessary that the intent with which he acted shall be equivalent in legal character to a criminal purpose aimed against life. Generally the intent must have been to commit either a specific felony, or at least an act involving all the wickedness of a felony. And if the intent be directly to produce a bodily injury, it must be such an injury as may be expected to involve serious consequences, either periling life or leading to great bodily harm. There is no rule recognized as authority which will allow a conviction of murder where a fatal result was not intended, unless the injury intended was one of a very serious character which might naturally and commonly involve loss of life, or grievous mischief. Every assault involves bodily harm. But any doctrine which would hold every assailant as a murderer where death follows his act, would be barbarous and unreasonable.

The language used in most of the statutes on felonious assaults, is, an intent to do "grievous bodily harm:" Carr. Sup., p. 237. And even such an assault, though "unlawfully and maliciously" made, is recognized as one where, if death followed, the result would not necessarily have been murder: Ibid. Our own statutes have made no provision for rendering assaults felonious, unless committed with a dangerous weapon, or with an intent to commit some felony: Comp. L., ch. 244.

In general, it has been held that where the assault is not committed with a deadly weapon, the intent must be clearly felonious, or the death will subject only to the charge of manslaughter. The presumption arising from the character of the instrument of violence, is not conclusive in either way, but where such weapons are used as do not usually kill, the deadly intent ought to be left in no doubt. There are cases on record where death by beating and kicking has been held to warrant a verdict of murder, the murderous intent being found. But where there was no such intent the ruling has been otherwise. In *State v. McNab*, 20 N. H., 160, it is held

that unless the unlawful act of violence intended was felonious, the offense was manslaughter. The same doctrine is laid down in *State v. Smith*, 32 Maine, 369. That is the statutory rule in New York and in some other states.

The willful use of a deadly weapon, without excuse or provocation, in such a manner as to imperil life, is almost universally recognized as showing a felonious intent: See 2 Bish. Cr. L., §§ 680, 681. But where the weapon or implement used is not one likely to kill or to maim, the killing is held to be manslaughter, unless there is an actual intent which shows a felonious purpose: See *Turner's case*, 1 Raym., 144, where a servant was hit on the head with a clog; *State v. Jarrott*, 1 Ired., 16, where the blow was with a hickory stick; *Holly v. State*, 10 Humph., 141, where a boy threw a stone; *Rex v. Kelley*, 1 Moody, C. C., 113, where it was uncertain whether a person was killed by a blow with the fist which threw him on a brick, or by a blow from a brick, and the court held it a clear case of manslaughter. In *Darry v. People*, 10 N. Y., 120, the distinctions are mentioned and relied upon, and in the opinion of Parker J. there are some remarks very applicable. In the case of *Com. v. Webster*, 5 Cush. R., 295, the rulings of which have been regarded as going beyond law in severity, this question, is dealt with in accordance with the same views, and quotations are given from East to the same purport.

The case of death in a prize fight is one of the commonest illustrations of manslaughter, where there is a deliberate arrangement to fight, and where great violence is always to be expected from the strength of the parties and the purpose of fighting till one or the other is unable to continue the contest. A duel with deadly weapons renders every killing murder; but a fight without weapons, or with weapons not deadly, leads only to manslaughter, unless death is intended: 1 East, P. C., 270; *Murphy's case*, 6 C. & P., 103; *Hargrave's case*, 5 C. & P., 170.

The case of *Commonwealth v. Fox*, 7 Gray, 585, is one resembling the present in several respects, in which the offense was held to be manslaughter.

The judgment must be reversed, and a new trial granted.

*Degrees of Murder.**Hopt v. People, 104 U. S. 631. (1881.)*

MR. JUSTICE GRAY delivered the opinion of the court.

The plaintiff in error was indicted, convicted, and sentenced for the crime of murder in the first degree in the District Court of the Third Judicial District of the Territory of Utah, and presented a bill of exceptions, which was allowed by the presiding judge, and from his judgment and sentence appealed to the Supreme Court of the Territory, and that court having affirmed the judgment and sentence, he sued out a writ of error from this court. Of the various errors assigned, we have found it necessary to consider two only.

The Penal Code of Utah contains the following provisions: "Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life,—is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." Sect. 89. "Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years." Sect. 90. Compiled Laws of Utah of 1876, pp. 585, 586.

By the Utah Code of Criminal Procedure, the charge of the judge to the jury at the trial "must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally" (sect. 257, cl. 7); the jury, upon retiring for deliberation, may take with them the written instructions given (sect. 289);

and "when written charges have been presented, given, or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions." Sect. 315. Laws of Utah of 1878, pp. 115, 121, 126.

It appears by the bill of exceptions that evidence was introduced at the trial tending to show that the defendant was intoxicated at the time of the alleged homicide.

The defendant's fifth request for instructions, which was indorsed "refused" by the judge, was as follows: "Drunkenness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of murder they have to determine the degree of crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered, where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration of or attempt to perpetrate arson, rape, robbery, or burglary. The degree of the offence depends entirely upon the question whether the killing was wilful, deliberate, and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be; not upon the ground that Drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime."

Upon this subject the judge gave only the following written instruction: "A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself, that law has never recognized it as an excuse for crime."

The instruction requested and refused, and the instruction given,

being matter of record and subjects of appeal under the provision of the Utah Code of Criminal Procedure, sect. 315, above quoted, their correctness is clearly open to consideration in this court. *Young v. Martin*, 8 Wall. 354.

At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence. *United States v. Drew*, 5 Mas. 28; *United States v. McGlue*, 1 Curt. 1; *Commonwealth v. Hawkins*, 3 Gray (Mass.), 463; *People v. Rogers*, 18 N. Y. 9. But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. The law has been repeatedly so ruled in the Supreme Judicial Court of Massachusetts in cases tried before a full court, one of which is reported upon other points (*Commonwealth v. Dorsey*, 103 Mass. 412); and in well-considered cases in courts of other States. *Pirtle v. State*, 9 Humph. (Tenn.) 663; *Haile v. State*, 11 id. 154; *Kelly v. Commonwealth*, 1 Grant (Pa.), Cas. 484; *Keenan v. Commonwealth*, 44 Pa. St. 55; *Jones v. Commonwealth*, 75 id. 403; *People v. Belencia*, 21 Cal. 544; *People v. Williams*, 43 id. 344; *State v. Johnson*, 40 Conn. 136, and 41 id. 584; *Pigman v. State of Ohio*, 14 Ohio, 555, 557. And the same rule is expressly enacted in the Penal Code of Utah, sect. 20: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Compiled Laws of Utah of 1876, pp. 568, 569.

The instruction requested by the defendant clearly and accurately stated the law applicable to the case; and the refusal to give that instruction, taken in connection with the unqualified instruction actually given, necessarily prejudiced him with the jury.

One other error assigned presents a question of practice of

such importance that it is proper to express an opinion upon it, in order to prevent a repetition of the error upon another trial.

By the provisions of the Utah Code of Criminal Procedure, already referred to, the charge of the judge to the jury at the trial must be reduced to writing before it is given, unless the parties consent to its being given orally; and the written charges or instructions form part of the record, may be taken by the jury on retiring for deliberation, and are subjects of appeal. The object of these provisions is to require all the instructions given by the judge to the jury to be reduced to writing and recorded, so that neither the jury, in deliberating upon the case, nor a court of error, upon exceptions or appeal, can have any doubt what those instructions were; and the giving, without the defendant's consent, of charges or instructions to the jury, which are not so reduced to writing and recorded, is error. *Feriter v. State*, 33 Ind. 283; *State of Missouri v. Cooper*, 45 Mo. 64; *People v. Sanford*, 43 Cal. 29; *Gile v. People*, 1 Col. 60; *State v. Potter*, 15 Kan. 302.

The bill of exceptions shows that the presiding judge, after giving to the jury an instruction requested in writing by the defendant upon the general burden of proof, proceeded of his own motion, and without the defendant's consent, to read from a printed book an instruction which was not reduced to writing, nor filed with the other instructions in the case, but was referred to in writing in these words only: "Follow this from Magazine American Law Register, July, 1868, page 559;" and that to the instruction so given an exception was taken and allowed.

This was a clear disregard of the provisions of the statute. The instruction was not reduced to writing, filed, and made part of the record, as the statute required. If the book was not given to the jury when they retired for deliberation, they did not have with them the whole of the instructions of the judge, as the statute contemplated. If they were permitted to take the book with them without the defendant's consent, that would of itself be ground of exception. *Merrill v. Nary*, 10 Allen (Mass.), 416.

For these reasons, the judgment must be reversed, and the case remanded with instructions to set aside the verdict and order a  
*New trial.*

*Suicide.*

*Commonwealth v. Mink, 123 Mass. 422. (1877.)*

INDICTMENT for the murder of Charles Ricker at Lowell, in the county of Middlesex, on August 31, 1876. Trial before *Ames and Morton, JJ.*, who allowed a bill of exceptions in substance as follows:

It was proved that Charles Ricker came to his death by a shot from a pistol in the hand of the defendant. The defendant introduced evidence tending to show that she had been engaged to be married to Ricker; that an interview was had between them at her room, in the course of which he expressed his intention to break off the engagement and abandon her entirely; that she thereupon went to her trunk, took a pistol from it, and attempted to use it upon herself, with the intention of taking her own life; that Ricker then seized her to prevent her from accomplishing that purpose, and a struggle ensued between them; and that in the struggle the pistol was accidentally discharged, and in that way the fatal wound inflicted upon him.

The jury were instructed on this point as follows: "If you believe the defendant's story, and that she did put the pistol to her head with the intention of committing suicide, she was about to do a criminal and unlawful act, and that which she had no right to do. It is true, undoubtedly, that suicide cannot be punished by any proceeding of the courts, for the reason that the person who kills himself has placed himself beyond the reach of justice, and nothing can be done. But the law, nevertheless, recognizes suicide as a criminal act, and the attempt at suicide is also criminal. It would be the duty of any bystander who saw such an attempt about to be made, as a matter of mere humanity, to interfere and try to prevent it. And the rule is, that if a homicide is produced by the doing of an unlawful act, although the killing was the last thing that the person about to do it had in his mind, it would be an unlawful killing, and the person would incur the responsibility which attaches to the crime of manslaughter.

"Then you are to inquire, among other things, and if you reach that part of the case, Did this woman attempt to commit suicide



in the presence of Ricker? and, if she did, I shall have to instruct you that he would have a right to interfere and try to prevent it by force. He would have a perfect right, and I think I might go further and say that it would be his duty, to take the pistol away from her if he possibly could, and to use force for that purpose. If then, in the course of the struggle on his part to get possession of the pistol to prevent the person from committing suicide, the pistol went off accidentally, and he lost his life in that way, it would be a case of manslaughter, and it would not be one of those accidents which would excuse the defendant from being held criminally accountable.

“Did she get into such a condition of despondency and disappointment that she was trying to commit suicide, and was about to do so? If that was her condition, if she was making that attempt, and he interfered to prevent it and got injured by an accidental discharge of the pistol, it would be manslaughter.” The jury returned a verdict of guilty of manslaughter; and the defendant alleged exceptions.

GRAY, C. J.

The life of every human being is under the protection of the law, and cannot be lawfully taken by himself, or by another with his consent, except by legal authority. By the common law of England, suicide was considered a crime against the laws of God and man, the goods and chattels of the criminal were forfeited to the King, his body had an ignominious burial in the highway, and he was deemed a murderer of himself and a felon, *felo de se*. *Hales v. Petit*, Plowd. 253, 261. 3 Inst. 54. 1 Hale P. C. 411-417. 2 Hale P. C. 62. 1 Hawk. c. 27. 4 Bl. Com. 95, 189, 190. “He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head.” 1 Hawk. c. 27, § 6. One who persuades another to kill himself, and is present when he does so, is guilty of murder as a principal in the second degree; and if two mutually agree to kill themselves together, and the means employed to produce death take effect upon one only, the survivor is guilty of the murder of the one who dies. Bac. Max. reg. 15. *Rex v. Dyson*, Russ. & Ry. 523. *Regina v. Alison*, 8 Car. & P. 418. One who encourages another to commit suicide, but is not present at the act which causes the death, is an accessory before the fact, and

at common law escaped punishment only because his principal could not be first tried and convicted. Russell's case, 1 Moody, 356. *Regina v. Leddington*, 9 Car. & P. 79. And an attempt to commit suicide is held in England to be punishable as a misdemeanor. *Regina v. Doody*, 6 Cox C. C. 463. *Regina v. Burgess*, Leigh & Cave, 258; S. C. 9 Cox C. C. 247.

In the Colony of Massachusetts, by the Body of Liberties of 1641, all lands and heritages were declared to be free, not only from all feudal burdens, but from all "escheats and forfeitures upon the death of parents or ancestors, be they natural, casual or judicial," to which later codes, besides inserting the word "unnatural," added "and that forever." Body of Liberties, art. 10; 28 Mass. Hist. Coll. 218. Mass. Col. Laws (ed. 1660), 48; (ed. 1672) 88; Anc. Chart. 147. The principle thus declared has always been followed in practice; and there has accordingly never been in Massachusetts any forfeiture upon one's death on conviction or suicide, unless under some particular statute creating the crime, of which no instance is remembered. 5 Dane Ab. 4, 251, 252. 7 Dane Ab. 318. But suicide continued to be considered *malum in se*, and a felony.

In 1660, the Legislature "judgeth that God calls them to bear testimony against such wicked and unnatural practices, that others may be deterred therefrom," and therefore enacted that every self-murderer "shall be denied the privilege of being buried in the common burying-place of Christians, but shall be buried in some common highway where the selectmen of the town where such person did inhabit shall appoint, and a cart-load of stones laid upon the grave, as a brand of infamy, and as a warning to others to beware of the like damnable practices." 4 Mass. Col. Rec. pt. i. 432; Mass. Col. Laws (ed. 1672), 137; Anc. Chart. 187. That statute, though fallen into disuse, continued in force until many years after the adoption of the Constitution of the Commonwealth. 7 Dane Ab. 208, 298.

An early statute of the Province directed that the form of verdict upon a coroner's inquest should state "where, at what time, by what means, with what instrument and in what manner the party was killed or came by his death," and that "if it appear to be self-murder, the inquisition must conclude after this manner, viz.: And so the jurors aforesaid say upon their oaths, that the said A. B. in manner and form aforesaid, then and there volun-

tarily and feloniously, as a felon of himself, did kill and murder himself, against the peace of our sovereign Lord the King, his crown and dignity." Prov. St. 1700-1701 (12 W. III.) c. 3, § 7; 1 Prov. Laws (State ed.), 429; Anc. Chart. 350. This accorded with the usual, though perhaps not necessary, form at common law. 1 Saund. 356, note. A statute, passed at the close of the American Revolution, upon the same subject, reenacted these directions, except in substituting for the last clause, "against the peace and dignity of the Commonwealth and the laws of the same." St. 1783, c. 43, § 2.

In *Commonwealth v. Bowen*, 13 Mass. 356, it was held that where one counselled another to commit suicide, who by reason of his advice, and in his presence, did so, the adviser was guilty of murder. The grounds of the decision of that case appear more clearly in the full report of the trial in a pamphlet published at Northampton, in 1816, from which the statement of the case in 13 Mass. is taken.

The indictment, drawn by Perez Morton, Attorney General, contained two counts. The first count alleged that Jonathan Jewett, with a cord, of which he had tied and fastened one end around his neck, and the other end around the iron gate of a window, "feloniously, wilfully and of his malice aforethought, did hang and strangle himself," and by reason thereof died, and so, "as a felon of himself, in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder himself." This count then went on to allege that the defendant, "before the felony and self-murder aforesaid," "feloniously, wilfully and of his malice aforethought, did counsel, hire, persuade and procure the said Jonathan Jewett the felony and murder of himself as aforesaid, in manner and by the means aforesaid, to do and commit," and so the defendant the said Jewett, "in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder." The second count was an ordinary count for murder, alleging that the defendant murdered Jewett by tying and fastening and procuring to be tied and fastened a cord around his neck and around the iron grate of a window, and thus hanging, strangling and suffocating him, and causing and procuring him to be hung, strangled and suffocated. *Bowen's Trial*, 3-6.

At the trial, before Chief Justice Parker and Justices Jackson

and Putnam, the attorney general put in evidence, without objection, the verdict of the coroner's jury, finding in substance that Jewett was found dead in prison, with a cord around his neck and around the iron grate, and concluding, in the form prescribed by the St. of 1783, that he "feloniously and as a felon of himself killed and murdered himself." Bowen's Trial, 12. The defendant's counsel, in argument, having stated that the first count charged the defendant as an accessory before the fact by aiding and abetting the murder, and the second count as the actor or principal in the murder, the Chief Justice suggested that he conceived both counts to charge the defendant as principal, and to this the attorney general assented. p. 22.

The Chief Justice, in charging the jury, said: "You have heard it said, gentlemen, that admitting the facts alleged in the indictment, still they do not amount to murder; for Jewett himself was the immediate cause and perpetrator of the act which terminated in his own destruction. That the act of Bowen was innocent no one will pretend, but is his offence embraced by the technical definition of a principal in murder? Self-destruction is doubtless a crime of awful turpitude; it is considered in the eye of the law of equal heinousness with the murder of one by another. In this offence, it is true the actual murderer escapes punishment; for the very commission of the crime, which the law would otherwise punish with its utmost rigor, puts the offender beyond the reach of its infliction. And in this he is distinguished from other murderers. But his punishment is as severe as the nature of the case will admit; his body is buried in infamy, and in England his property is forfeited to the King. Now if the murder of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder of A. by B.; and I apprehend that if a man murders himself, and one stands by, aiding in and abetting the death, he is as guilty as if he had conducted himself in the same manner where A. murders B. And if one becomes the procuring cause of death, though absent, he is accessory." Bowen's Trial, 51, 52. It is evident that this part of the charge related solely to the first count; for the introductory words "admitting the facts alleged in the indictment" could have no application to the second count; and what was said about an accessory was comparatively immaterial, because the defendant, as we have already seen, was charged as a principal only.

Suicide has not ceased to be unlawful and criminal in this Commonwealth by the simple repeal of the Colony Act of 1660 by the St. of 1823, c. 143, which (like the corresponding St. of 4 G, IV. c. 52, enacted by the British Parliament within a year before) may well have had its origin in consideration for the feelings of innocent surviving relatives; nor by the briefer directions as to the form of coroner's inquests in the Rev. Sts. c. 140, § 8, and the Gen. Sts. c. 175, § 9, which in this, as in most other matters, have not repeated at length the forms of legal proceedings set forth in the statutes codified; nor by the fact that the Legislature, having in the general revisions of the statutes measured the degree of punishment for attempts to commit offences by the punishment prescribed for each offence if actually committed, has, intentionally or inadvertently, left the attempt to commit suicide without punishment, because the completed act would not be punished in any manner. Rev. Sts. c. 133, § 12. Gen. Sts. c. 168, § 8. *Commonwealth v. Dennis*, 105 Mass. 162. After all these changes in the statutes, the point decided in Bowen's case was ruled in the same way by Chief Justice Bigelow and Justices Dewey, Metcalf and Chapman, in a case which has not been reported. *Commonwealth v. Pratt*, Berkshire, 1862.

Since it has been provided by statute that "any crime punishable by death or imprisonment in the state prison is a felony, and no other crime shall be so considered," it may well be that suicide is not technically a felony in this Commonwealth. Gen. Sts. c. 168, § 1. St. 1852, c. 37, § 1. But being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal. Every one has the same right and duty to interpose to save a life from being so unlawfully and criminally taken, that he would have to defeat an attempt unlawfully to take the life of a third person. Fairfax, J., in 22 E. IV. 45, pl. 10. *Marler v. Ayliffe*, Cro. Jac. 134. 2 Rol. Ab. 559. 1 Hawk. c. 60, § 23. And it is not disputed that any person who, in doing or attempting to do an act which is unlawful and criminal, kills another, though not intending his death, is guilty of criminal homicide, and, at the least, of manslaughter.

The only doubt that we have entertained in this case is, whether the act of the defendant, in attempting to kill herself, was not so malicious, in the legal sense, as to make the killing of another

person, in the attempt to carry out her purpose, murder, and whether the instructions given to the jury were not therefore too favorable to the defendant. *Exceptions overruled.*

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*Distinction Between Murder and Manslaughter.*

*People v. Freel, 48 Cal. 436. (1874.)*

The defendant was indicted for the crime of murder, alleged to have been committed at San Francisco, on the first day of November, 1873, by killing one Edward W. Allen. Allen kept a saloon, and a crowd of persons having collected there so as to obstruct his doorway, he went from his place behind the bar with a cane or stick to clear the passage-way. A difficulty took place, during which he was killed. The defendant claimed to have been justified, but the testimony was of such a character, that it became a question, if he was not justified, whether the offense was murder or manslaughter. The defendant was convicted of murder in the second degree, and appealed.

By the Court, NILES, J.:

The Court instructed the jury as follows: "You will also observe that the difference between murder and manslaughter is, that in manslaughter there is no intention whatever either to kill or to do bodily harm. The killing is the unintentional result of a sudden heat of passion, or of an unlawful act committed without due caution or circumspection."

This is clearly erroneous. Whether the homicide amounts to murder or to manslaughter merely, does not depend upon the presence or absence of the intent to kill. In either case there may be a present intention to kill at the moment of the commission of the act. But when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder.

Under the circumstances of this case, as shown by the testimony, it was important that the distinctions between the several grades

of homicide should be correctly stated to the jury. They could hardly fail to be misled by the erroneous instruction we have noticed.

Several other points were made by the counsel for defendant, which we do not deem it necessary to discuss.

Judgment and order reversed, and cause remanded for a new trial.

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*Voluntary Manslaughter.*

*Maher v. People, 10 Mich. 212. (1862.)*

CHRISTIANCY, J.:

The prisoner was charged with an assault with intent to kill and murder one Patrick Hunt. The evidence on the part of the prosecution was that the prisoner entered the saloon of one Michael Foley, in the village of Houghton, where said Hunt was standing with several other persons; that prisoner entered through a back door, and by a back way leading to it, in his shirt sleeves, in a state of great perspiration, and appearing to be excited, and, on being asked if he had been at work, said he had been across the lake; that, on entering the saloon, he immediately passed nearly through it, to where said Hunt was standing, and, on his way towards Hunt, said something, but it did not appear what, or to whom; that, as soon as the prisoner came up to where Hunt was standing, he fired a pistol at Hunt, the charge of which took effect upon the head of Hunt, in and through the left ear, causing a severe wound thereon; by reason of which Hunt in a few moments fell to the floor, was partially deprived of his sense of hearing in that ear, and received a severe shock to his system, which caused him to be confined to his bed for about a week, under the care of a physician; that, immediately after the firing of the pistol, prisoner left the saloon, nothing being said by Hunt or the prisoner. It did not appear how, or with what, the pistol was loaded. The prisoner offered evidence tending to show an adulterous intercourse between his wife and Hunt on the morning of the assault, and within less than half an hour previous; that the prisoner saw them going into the woods together about half an hour before the assault; that on their coming out of the woods the prisoner followed them immediately (evidence having already been given that the prisoner had

followed them to the woods); that on their coming out of the woods the prisoner followed them, and went after said Hunt into the saloon, where, on his arrival, the assault was committed; that the prisoner, on his way to the saloon, a few minutes before entering it, was met by a friend, who informed him that Hunt and the prisoner's wife had had sexual intercourse the day before in the woods. This evidence was rejected by the court, and the prisoner excepted. Was the evidence properly rejected? This is the main question in the case, and its decision must depend upon the question whether the proposed evidence would have tended to reduce the killing, had death ensued, from murder to manslaughter, or, rather, to have given it the character of manslaughter, instead of murder? If the homicide, in case death had ensued, would have been but manslaughter, then defendant could not be guilty of the assault with intent to murder, but only of a simple assault and battery. The question therefore involves essentially the same principles as where evidence is offered for a similar purpose in a prosecution for murder; except that, in some cases of murder, an actual intention to kill need not exist; but, in a prosecution for an assault with intent to murder, the actual intention to kill must be found, and that under circumstances which would make the killing murder.

Homicide, or the mere killing of one person by another, does not, of itself, constitute murder; it may be murder, or manslaughter, or excusable, or justifiable homicide, and therefore entirely innocent according to the circumstances, or the disposition or state of mind or purpose, which induced the act. It is not, therefore, the act which constitutes the offense, or determines its character; but the *quo animo*, the disposition, or state of mind, with which it is done. "*Actus non facit reum nisi mens sit rea.*" *People v. Pond*, 8 Mich. 150.

To give the homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice prepense or aforethought. This malice is just as essential an ingredient of the offence as the act which causes the death; without the concurrence of both, the crime cannot exist; and, as every man is presumed innocent of the offense with which he is charged, till he is proved to be guilty, this presumption must apply equally to both ingredients of the offense,—to the malice as well as to the killing. Hence, though the principle seems to have been sometimes



overlooked, the burden of proof, as to each, rests equally upon the prosecution, though the one may admit and require more direct proof than the other; malice, in most cases, not being susceptible of direct proof, but to be established by inferences more or less strong, to be drawn from the facts and circumstances connected with the killing, and which indicate the disposition or state of mind with which it was done. It is for the court to define the legal import of the term "malice aforethought," or, in other words, that state or disposition of mind which constitutes it; but the question whether it existed or not, in the particular instance, would, upon principle, seem to be as clearly a question of fact for the jury, as any other fact in the cause, and that they must give such weight to the various facts and circumstances accompanying the act, or in any way bearing upon the question, as, in their judgment, they deserve, and that the court have no right to withdraw the question from the jury by assuming to draw the proper inferences from the whole, or any part of, the facts proved, as presumption of law. If courts could do this, juries might be required to find the fact of malice where they were satisfied from the whole evidence it did not exist. I do not here speak of those cases in which the death is caused in the attempt to commit some other offense, or in illegal resistance to public officers, or other classes of cases which may rest upon peculiar grounds of public policy, and which may or may not form an exception; but of ordinary cases, such as this would have been, had death ensued. It is not necessary here to enumerate all the elements which enter into the legal definition of "malice aforethought." It is sufficient to say that, within the principle of all recognized definitions, the homicide must, in all ordinary cases, have been committed with some degree of coolness and deliberation, or, at least, under circumstances in which ordinary men, or the average of men recognized as peaceable citizens, would not be liable to have their reason clouded or obscured by passion; and the act must be prompted by, or the circumstances indicate that it sprung from, a wicked, depraved or malignant mind,—a mind which, even in its habitual condition, and when excited by no provocation which would be liable to give undue control to passion in ordinary men, is cruel, wanton, or malignant, reckless of human life, or regardless of social duty.

But if the act of killing, though intentional, be committed under the influence of passion, or in heat of blood, produced by an

adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition, then the law, out of indulgence to the frailty of human nature, or, rather in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter.

To what extent the passions must be aroused, and the dominion of reason disturbed, to reduce the offense from murder to manslaughter, the cases are by no means agreed; and any rule which should embrace all the cases that have been decided in reference to this point would come very near obliterating, if it did not entirely obliterate, all distinction between murder and manslaughter in such cases. We must therefore endeavor to discover the principle upon which the question is to be determined. It will not do to hold that reason should be entirely dethroned, or overpowered by passion, so as to destroy intelligent volition. *State v. Hill*, 4 Dev. & B. 491; *Haile v. State*, 1 Swan, 248; *Young v. State*, 11 Humph. 200. Such a degree of mental disturbance would be equivalent to utter insanity, and, if the result of adequate provocation, would render the perpetrator morally innocent. But the law regards manslaughter as a high grade of offense; as a felony. On principle, therefore, the extent to which the passions are required to be aroused and reason obscured must be considerably short of this, and never beyond that degree within which ordinary men have the power, and are therefore morally as well as legally bound, to restrain their passions. It is only on the idea of a violation of this clear duty that the act can be held criminal. There are many cases to be found in the books in which this consideration, plain as it would seem to be in principle, appears to have been, in a great measure, overlooked, and a course of reasoning adopted which could only be justified on the supposition that the question was between murder and excusable homicide.

The principle involved in the question, and which I think clearly deducible from the majority of well-considered cases, would seem to suggest as the true general rule that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition,

liable to act rashly, or without due deliberation or reflection, and from passion, rather than judgment.

To the question, what shall be considered in law a **reasonable** or adequate provocation for such state of mind, so as to give to a homicide committed under its influence the character of manslaughter? on principle, the answer, as a general rule, must be, anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them,—not such a provocation as must, by the laws of the human mind, produce such an effect with the certainty that physical effects follow from physical causes, for then the individual could hardly be held morally accountable. Nor, on the other hand, must the provocation, in every case, be held sufficient or reasonable, because such a state of excitement has followed from it; for then, by habitual and long-continued indulgence of evil passions, a bad man might acquire a claim to mitigation which would not be available to better men, and on account of that very wickedness of heart which, in itself, constitutes an aggravation both in morals and in law.

In determining whether the provocation is sufficient or reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard,—unless, indeed, the person whose guilt is in question be shown to have some peculiar weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition.

It is, doubtless, in one sense, the province of the court to define what, in law, will constitute a reasonable or adequate provocation, but not, I think, in ordinary cases, to determine whether the provocation proved in the particular case is sufficient or reasonable. This is essentially a question of fact, and to be decided with reference to the peculiar facts of each particular case. As a general rule, the court, after informing the jury to what extent the passions must be aroused, and reason obscured, to render the homicide manslaughter, should inform them that the provocation must be one, the tendency of which would be to produce such a degree of excitement and disturbance in the minds of ordinary men; and if they should find such provocation from the facts proved, and should further find that it did produce that effect in the particular instance, and that the homicide was the result of such provocation,

it would give it the character of manslaughter. Besides the consideration that the question is essentially one of fact, jurors, from the mode of their selection, coming from the various classes and occupations of society, and conversant with the practical affairs of life, are, in my opinion, much better qualified to judge of the sufficiency and tendency of a given provocation, and much more likely to fix, with some degree of accuracy, the standard of what constitutes the average of ordinary human nature, than the judge whose habits and course of life give him much less experience of the workings of passion in the actual conflicts of life.

The judge, it is true, must, to some extent, assume to decide upon the sufficiency of the alleged provocation, when the question arises upon the admission of testimony; and when it is so clear as to admit of no reasonable doubt, upon any theory, that the alleged provocation could not have had any tendency to produce such state of mind, in ordinary men, he may properly exclude the evidence; but, if the alleged provocation be such as to admit of any reasonable doubt, whether it might not have had such tendency, it is much safer, I think, and more in accordance with principle, to let the evidence go to the jury under the proper instructions. As already intimated, the question of the reasonableness or adequacy of the provocation must depend upon the facts of each particular case. That can with no propriety be called a rule (or a question) of law which must vary with, and depend upon, the almost infinite variety of facts presented by the various cases as they arise. See Starkie, *Ev.* (Am. Ed. 1860) pp. 676-680. The law cannot with justice assume, by the light of past decisions, to catalogue all the various facts and combinations of facts which shall be held to constitute reasonable or adequate provocation. Scarcely two past cases can be found which are identical in all their circumstances, and there is no reason to hope for greater uniformity in future. Provocations will be given without reference to any previous model, and the passions they excite will not consult the precedents.

The same principles which govern, as to the extent to which the passions must be excited and reason disturbed, apply with equal force to the time during which its continuance may be recognized as a ground for mitigating the homicide to the degree of manslaughter, or, in other words, to the question of cooling time. This, like the provocation itself, must depend upon the

nature of man and the laws of the human mind, as well as upon the nature and circumstances of the provocation, the extent to which the passions have been aroused, and the fact whether the injury inflicted by the provocation is more or less permanent or irreparable. The passion excited by a blow received in a sudden quarrel, though perhaps equally violent for the moment, would be likely much sooner to subside than if aroused by a rape committed upon a sister or a daughter, or the discovery of an adulterous intercourse with a wife; and no two cases of the latter kind would be likely to be identical in all their circumstances of provocation. No precise time, therefore, in hours or minutes, can be laid down by the court, as a rule of law, within which the passion must be held to have subsided and reason to have resumed its control, without setting at defiance the laws of man's nature, and ignoring the very principle on which provocation and passion are allowed to be shown, at all, in mitigation of the offense. The question is one of reasonable time, depending upon all the circumstances of the particular case; and where the law has not defined, and cannot without gross injustice define, the precise time which shall be deemed reasonable, as it has with respect to notice of the dishonor of commercial paper. In such case, where the law has defined what shall be reasonable time, the question of such reasonable time, the facts being found by the jury, is one of law for the court, but in all other cases it is a question of fact for the jury; and the court cannot take it from the jury, by assuming to decide it as a question of law, without confounding the respective provinces of the court and jury. Starkie, Ev. (Am. Ed. 1860) pp. 768, 769, 774, 775. In *Rex v. Hayward*, 6 Car. & P. 157, and *Rex v. Lynch*, 5 Car. & P. 324, this question of reasonable cooling time was expressly held to be a question of fact for the jury. And see Whart. Cr. Law (4th Ed.), § 990, and cases cited. I am aware there are many cases in which it has been held a question of law, but I can see no principle on which such a rule can rest. The court should, I think, define to the jury the principles upon which the question is to be decided, and leave them to determine whether the time was reasonable, under all the circumstances of the particular case. I do not mean to say that the time may not be so great as to enable the court to determine that it is sufficient for the passion to have cooled, or so to instruct the jury, without error; but the case should be very clear. And in cases of applications for a new trial,

depending upon the discretion of the court, the question may very properly be considered by the court.

It remains only to apply these principles to the present case. The proposed evidence, in connection with what had already been given, would have tended strongly to show the commission of adultery by Hunt with the prisoner's wife, within half an hour before the assault; that the prisoner saw them going to the woods together, under circumstances calculated strongly to impress upon his mind the belief of the adulterous purpose; that he followed after them to the woods; that Hunt and the prisoner's wife were, not long after, seen coming from the woods; and that the prisoner followed them, and went in hot pursuit after Hunt to the saloon, and was informed by a friend on the way that they had committed adultery the day before in the woods. I cannot resist the conviction that this would have been sufficient evidence of provocation to go to the jury, and from which, when taken in connection with the excitement and "great perspiration" exhibited on entering the saloon, the hasty manner in which he approached and fired the pistol at Hunt, it would have been competent for the jury to find that the act was committed in consequence of the passion excited by the provocation, and in a state of mind which, within the principle already explained, would have given to the homicide, had death ensued, the character of manslaughter only. In holding otherwise the court below was doubtless guided by those cases in which courts have arbitrarily assumed to take the question from the jury, and to decide upon the facts, or some particular fact, of the case, whether a sufficient provocation had been shown, and what was a reasonable time for cooling.

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The judgment should be reversed, and a new trial granted.

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### *Involuntary Manslaughter.*

*State v. Hardie, 47 Iowa, 647. (1878.)*

The defendant was indicted for murder in the second degree. He was convicted of the crime of manslaughter, and sentenced to the penitentiary for one year. The facts of the case appear in the opinion.

ROTHROCK, CH. J.:

I. It appears from the evidence that the defendant was a boarder in the family of one Gantz, who is his brother-in-law. On the day of the homicide defendant was engaged in varnishing furniture. Mrs. Sutfen, a neighbor, called at the house, and after some friendly conversation she went into the kitchen. When she came back defendant picked up a tack hammer and struck on the door. She said, "My God, I thought it was a revolver." A short time afterwards she went into the yard to get a kitten. Defendant said he would frighten her with the revolver as she came in. He took a revolver from a stand drawer and went out of the room, and was in the kitchen when the revolver was discharged. He immediately came in and said to Mrs. Gantz, his sister, "My God, Hannah, come and see what I have done." His sister went out and found Mrs. Sutfen lying on the sidewalk at the side of the house, with a gunshot wound in the head, and in a dying condition. A physician was immediately called and made an examination of the deceased, took the revolver from the defendant, and informed him that nothing could be done for the deceased, whereupon the defendant became violent, said the shot was accidental, and exclaimed several times that he would kill himself. It became necessary to secure him, which was done by tying him with ropes.

The revolver had been in the house for about five years. It was found by Gantz in the road. There was one load in it when found. Some six months after it was found Gantz tried to shoot the load from it and it would not go off. He tried to punch the load out, but could not move it. He then laid it away, thinking it was harmless. The defendant was about the house and knew the condition of the revolver. Upon one occasion Gantz said he would try to kill a cat with the revolver. Defendant being present said he would not be afraid to allow it to be snapped at him all day. The revolver remained in the same condition that it was when found, no other load having been put into it, and it was considered by the family as well as defendant as entirely harmless.

The foregoing is the substance of all the evidence.

The State did not claim that the defendant was guilty of murder, but that he was guilty of manslaughter because of criminal carelessness. The defendant insisted that there was no such carelessness as to render the act criminal, and that it was homicide by misadventure, and therefore excusable.

The court instructed the jury as follows: "5. And on the charge of manslaughter, I instruct you that if the defendant used a dangerous and deadly weapon, in a careless and reckless manner, by reason of which instrument so used he killed the deceased, then he is guilty of manslaughter, although no harm was in fact intended."

Other instructions of like import were given, and the question of criminal carelessness was submitted to the jury, as follows: "8th. And in this case I submit to you to find the facts of recklessness and carelessness under the evidence, and if you find that the death of the party was occasioned through recklessness and carelessness of the defendant then you should convict him, and if not you should acquit. And by this I do not mean that defendant is to be held to the highest degree of care and prudence in handling a dangerous and deadly weapon, but only such care as a reasonably prudent man should and ought to use under like circumstances, and if he did not use such care he should be convicted, otherwise he should be acquitted."

There can be no doubt that the instructions given by the court embody the correct rule as to criminal carelessness in the use of a deadly weapon. Counsel for defendant insist that the instructions of the court do not go far enough, and upon the trial asked that the court give to the jury the following instruction:

"3. Although the deceased came to her death from the discharge of a pistol in the hands of the defendant, yet if the defendant had good reason to believe, and did believe, that the pistol which caused her death was not in any manner dangerous, but was entirely harmless, and if he did nothing more than a man of ordinary prudence and caution might have done under like circumstances, then the jury should find him not criminally liable and should acquit."

This instruction and others of like import were refused by the court, and we think the ruling was correct. That the revolver was in fact a deadly weapon is conclusively shown by the terrible tragedy consequent upon defendant's act in firing it off. If it had been in fact unloaded no homicide would have resulted, but the defendant would have been justly censurable for a most reckless and imprudent act in frightening a woman by pretending that it was loaded, and that he was about to discharge it at her. No jury would be warranted in finding that men of ordinary prudence so



conduct themselves. On the contrary, such conduct is grossly reckless and reprehensible, and without palliation or excuse. Human life is not to be sported with by the use of firearms, even though the person using them may have good reason to believe that the weapon used is not loaded, or that being loaded it will do no injury. When persons engage in such reckless sport they should be held liable for the consequences of their acts.

II. It is argued that the evidence does not show the defendant guilty of criminal carelessness, because it does not appear that the defendant pointed the pistol at the deceased, or how it happened to be discharged. The fact that defendant took the weapon from the drawer with the avowed purpose of frightening the deceased, and while in his hands it was discharged with fatal effect, together with his admission that he did the act, fully warranted the jury in finding that he purposely pointed the pistol and discharged it at the deceased.

AFFIRMED.

## CHAPTER VIII.

### OFFENSES AGAINST THE PERSON. [CONTINUED.]

#### JUSTIFIABLE HOMICIDE.

*Head v. Martin, 85 Ky. 480. (1887.)*

JUDGE HOLT delivered the opinion of the court.

The single question presented is, whether a peace officer may, in order to arrest one upon a warrant for bastardy, or to prevent his escape after arrest, kill him *when fleeing*. If he has the right under such circumstances to shoot and wound him, as was done in this instance, then it necessarily follows that he can not be held responsible if it results in death.

It is attempted to draw a distinction between a case where one is attempting to avoid arrest, and where one is endeavoring to escape after arrest. If, however, the offender is *in flight*, and is not at the time resisting the officer, then the law is the same, whether he be fleeing to avoid arrest or to escape from custody. (2 Bishop on Criminal Law, section 664; Wharton on Homicide, sections 212-214.) The averments of the answer, admitted by the demurrer, show that the appellee, Martin, had in fact been arrested by the appellant, Head, as deputy sheriff, and was shot by the latter *when fleeing* from his custody; but the fact that an arrest had been made does not alter the law of the case.

A bastardy proceeding is, under our law, a civil one. Yet it proceeds in the name of the Commonwealth, and under the statute the offender is subject to arrest. As to the question now before us, it is, therefore, to be regarded in the same light as a misdemeanor.

Our statute is silent, unless it may be regarded as speaking by implication, as to the force an officer may use in effecting an arrest, or in recapturing a prisoner. It merely provides, that "no unnecessary force or violence shall be used in making the arrest."

We, therefore, turn to the common law for guidance. By it an officer in a case of *felony* may use such force as is necessary to capture the felon, even to killing him when in flight. In the case of a *misdemeanor*, however, the rule is different. It is his duty

to make the arrest; he may summon a *posse*, and may defend himself, if resisted, even to the taking of life; but when the offender is not resisting, but fleeing, he has no right to kill. Human life is too sacred to admit of a more severe rule. Officers of the law are properly clothed with its sanctity; they represent its majesty, and must be properly protected; but to permit the life of one charged with a mere misdemeanor to be taken when fleeing from the officer would, aside from its inhumanity, be productive of more abuse than good. The law need not go unenforced. The officer can summon his *posse*, and take the offender.

The reason for this distinction is obvious. The security of person and property is not endangered by a petty offender being at large, as in the case of a felon. The very being of society and government requires the speedy arrest and punishment of the latter.

Bishop says: "The justification of homicide happening in the arrest of persons charged with misdemeanors, or breaches of the peace, is subject to a different rule from that which we have been laying down in respect to cases of felony; for, generally speaking, in misdemeanors it will be murder to kill the party accused for flying from the arrest, though he can not otherwise be overtaken, and though there be a warrant to apprehend him; but under circumstances, it may amount only to manslaughter, if it appear that death was not intended. \* \* \* \*

"But in misdemeanors and breaches of the peace, as well as in cases of felony, if the officer meet with resistance and the offender is killed in the struggle, the killing will be justified." (2 Bishop on Criminal Law, sections 662-3.)

The same rule may be found in the works of the other common law writers.

Hale says: "And here is the difference between civil actions and felonies. If a man be in danger of arrest by a *capias* in debt or trespass and he flies, and the bailiff kills him, it is murder; but if a felon flies, and he can not be otherwise taken, if he be killed it is no felony, and in that case the officer so killing forfeits nothing, but the person so assaulted and killed forfeits his goods." (1 Hale's Pleas of the Crown, page 481.)

So great, however, is the law's regard for human life, that if even a felon can be taken without the taking of life, and he be slain, it is at least manslaughter. Even as to him, it can be done only of necessity.

An officer in arresting or preventing an escape for a misdemeanor may oppose force to force, and sufficient to overcome it, even to the taking of life. If the offender puts the life of the officer in jeopardy, the latter may *se defendendo* slay him; but he must not use any greater force than is reasonably and apparently necessary for his protection.

It is often said, that an officer may use such force as is necessary to make an arrest. Generally speaking, this is true. It was so said in the cases of *Fleetwood v. Commonwealth*, 80 Ky. 1, and *Moccabee v. Commonwealth*, 78 Ky. 380. But in those cases a deadly affray between parties was in progress or about to occur, endangering the lives not only of the participants, but innocent persons; and it was the duty of the officer, when resisted, to quell it even at the sacrifice of human life. In these cases he was justified in killing, not only *se defendendo*, but to prevent the impending commission of a felony.

In case, however, of a mere riot upon one day, and an attempted arrest upon the next, surely the officer would not be justified in killing the offender when fleeing from custody or to escape arrest. A person commits a misdemeanor by the use of profane language; he flees from the officer attempting to arrest him or from custody. The dictates of humanity as well as the legal rule forbid the taking of his life under such circumstances.

The officer must in such a case summon his *posse*, and take him. He has no more right to kill him than he would have if the offender were to lie down and refuse to go with him.

It is said, however, that the appellee was in the wrong; that there as a sort of contributory neglect upon his part which produced the injury. It was not, however, such neglect or conduct as, under ordinary circumstances, would produce the injury. It could not be expected that, in consequence of it, the officer would go beyond the limit of the law, and employ force when and of a character forbidden by it. It is not a question whether unnecessary force was used; but the answer of the appellant shows that he used it when and in a degree forbidden by the law.

The demurrer was, therefore, properly sustained, and the judgment must be affirmed.

## EXCUSABLE HOMICIDE.

*Pond v. People, 8 Mich. 149. (1860.)*

CAMPBELL, J.:

The defense of this case, as presented in the court below, was based upon a claim that the accused was only chargeable with excusable or justifiable homicide. And as most of the questions raised before us involve the consideration of the same subject, it may be necessary to examine somewhat carefully into the rules which divide homicide into its various heads, and determine the character of each act of slaying.

The facts are claimed, by the counsel for the accused, to have a tendency to establish the act as innocent on various grounds—*first*, as excusable in defense of himself or his servant; *second*, as justifiable in repelling a riotous attack, and, *third*, as justifiable in resisting a felony.

The first inquiry necessary is one which applies equally to all of the grounds of defense; and is whether the necessity of taking life, in order to excuse or justify the slayer, must be one arising out of actual and imminent danger; or whether he may act upon a belief, arising from appearances which give him reasonable cause for it, that the danger is actual and imminent, although he may turn out to be mistaken.

Human life is not to be lightly disregarded, and the law will not permit it to be destroyed unless upon urgent occasion. But the rules which make it excusable or justifiable to destroy it under some circumstances, are really meant to insure its general protection. They are designed to prevent reckless and wicked men from assailing peaceable members of society, by exposing them to the danger of fatal resistance at the hands of those whom they wantonly attack, and put in peril or fear of great injury or death. And such rules, in order to be of any value, must be in some reasonable degree accommodated to human character and necessity. They should not be allowed to entrap or mislead those whose misfortunes compel a resort to them.

Were a man charged with crime to be held to a knowledge of all facts precisely as they are, there could be few cases in which

the most innocent intention or honest zeal could justify or excuse homicide. The jury, by a careful sifting of witnesses on both sides, in cool blood, and aided by the comments of court and counsel, may arrive at a tolerably just conclusion on the circumstances of an assault. But the prisoner, who is to justify himself, can hardly be expected to be entirely cool in a deadly affray, or in all cases to have great courage or large intellect; and can not well see the true meaning of all that occurs at the time; while he can know nothing whatever concerning what has occurred elsewhere, or concerning the designs of his assailants, any more than can be inferred from appearances. And the law, while it will not generally excuse mistakes of law (because every man is bound to know that), does not hold men responsible for a knowledge of facts unless their ignorance arises from fault or negligence.

A criminal intent is a necessary ingredient of every crime. And therefore it is well remarked by Baron Parke in *Regina v. Thurborn*, 2 C. & K. 832, that "as the rule of law, founded on justice and reason, is that *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend on the circumstances as they appear to him." And Mr. Bishop has expressed the same rule very clearly, by declaring that "in all cases where a party, without fault or carelessness, is misled concerning facts, and acts as he would be justified in doing if the facts were what he believed them to be, he is legally as he is morally innocent: 1 Bish. Cr. L., § 242.

These principles have always been recognized, and are sustained by numerous authorities; but they need no vindication, and a further citation would add nothing to the clear and intelligible statements already referred to. And from an examination of some of the charges given, we are very much inclined to believe that the court below entertained the same views, at least as to some branches of the defense. But as some of the charges actually given, and particularly those in response to the first and second instructions requested, negative this rule, and the jury upon those must have been misled, we must regard these charges as erroneous unless they were inapplicable to the case altogether. Their applicability will be presently considered.

In order to determine the materiality of the questions of law raised, it becomes necessary to determine under what circumstances homicide is excusable or justifiable. In doing this, it will be proper to advert merely to those instances which may be re-

garded as coming nearest to the circumstances of the case before us. The other cases we are not called upon to define or consider; and what we say is to be interpreted by the case before us.

The only variety of excusable homicide (as contradistinguished from justifiable homicide at common law) which we need advert to, is that which is technically termed homicide *se aut sua defendendo*, and which embraces the defense of one's own life, or that of his family, relatives or dependents, within those relations where the law permits the defense of others as of one's self. Practically, so far as punishment is concerned, there is no distinction with us between excusable and justifiable homicide; but a resort to common law distinctions will nevertheless be convenient, in order to illustrate the difference between the various instances of homicide in repelling assaults, according as they are or are not felonious. Homicide *se defendendo* was excusable at common law when it occurred in a sudden affray, or in repelling an attack not made with a felonious design. According to Mr. Hawkins, it was excusable and not justifiable, because, occurring in a quarrel, it generally assumed some fault on both sides: Hawk. P. C., B. 1, Ch. 28, § 24. In these cases, the original assault not being with a felonious intent, and the danger arising in the heat of blood on one or both sides, the homicide is not excused unless the slayer does all which is reasonably in his power to avoid the necessity of extreme resistance, by retreating where retreat is safe, or by any other expedient which is attainable. He is bound, if possible, to get out of his adversary's way, and has no right to stand up and resist if he can safely retreat or escape. See 2 Bish. Cr. L., §§ 543 to 552, 560 to 562, 564 to 568; *People v. Sullivan*, 3 Seld. 396; 1 Russ. Cr. 660, *et seq.* Mr. Russell lays down the rule very concisely as follows (p. 661): "The party assaulted must therefore flee, as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life or great bodily harm; and then, in his defense, he may kill his assailant instantly. Before a person can avail himself of the defense that he used a weapon in defense of his life, he must satisfy the jury that that defense was necessary; that he did all he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him a reasonable

apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he would be justified." A man may defend his family, his servants or his master, whenever he may defend himself. How much further this mutual right exists, it is unnecessary in this case to consider. See 2 Bish. Cr. L., § 581, and cases cited; 1 Russ. Cr. 662; 4 Bl. Com. 184.

There are many curious and nice questions concerning the extent of the right of self-defense, where the assailed party is in fault. But as neither Pond nor Cull were in any way to blame in bringing about the events of Friday night, which led to the shooting of Blanchard, it is not important to examine them. The danger to be resisted must be to life, or of serious bodily harm of a permanent character; and it must be unavoidable by other means. Of course, we refer to means within the power of the slayer, so far as he is able to judge from the circumstances as they appear to him at the time.

A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life. But here, as in the other cases, he must not take life if he can otherwise arrest or repel the assailant: 2 Bish. Cr. L., § 569; 3 Greenl. Ev., § 117; Hawk. P. C., B. 1, ch. 28, § 23. Where the assault or breaking is felonious, the homicide becomes justifiable, and not merely excusable.

The essential difference between excusable and justifiable homicide rests not merely in the fact that at common law the one was felonious, although pardoned of course, while the other was innocent. Those only were justifiable homicides where the slayer was regarded as promoting justice, and performing a public duty; and the question of personal danger did not necessarily arise, although it does generally.

It is held to be the duty of every man who sees a felony attempted by violence, to prevent it if possible, and in the performance of this duty, which is an active one, there is a legal right to use all necessary means to make the resistance effectual. Where a felonious act is not of a violent or forcible character, as in picking pockets, and crimes partaking of fraud rather than force, there is no necessity, and, therefore, no justification, for homicide, unless



possibly in some exceptional cases. The rule extends only to cases of felony, and in those it is lawful to resist force by force. If any forcible attempt is made, with a felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger. Life may not properly be taken under this rule where the evil may be prevented by other means within the power of the person who interferes against the felon. Reasonable apprehension, however, is sufficient here, precisely as in all other cases.

It has also been laid down by the authorities, that private persons may forcibly interfere to suppress a riot or resist rioters, although a riot is not necessarily a felony in itself. This is owing to the nature of the offense, which requires the combination of three or more persons, assembling together and actually accomplishing some object calculated to terrify others. Private persons who can not otherwise suppress them, or defend themselves from them, may justify homicide in killing them, as it is their right and duty to aid in preserving the peace. And perhaps no case can arise where a felonious attempt by a single individual will be as likely to inspire terror as the turbulent acts of rioters. And a very limited knowledge of human nature is sufficient to inform us, that when men combine to do an injury to the person or property of others, of such a nature as to involve excitement and provoke resistance, they are not likely to stop at half-way measures, or to scan closely the dividing line between felonies and misdemeanors. But when the act they meditate is in itself felonious, and of a violent character, it is manifest that strong measures will generally be required for their effectual suppression, and a man who defends himself, his family or his property, under such circumstances, is justified in making as complete a defense as is necessary.

When we look at the facts of this case, we find very strong circumstances to bring the act of Pond within each of the defenses we have referred to. Without stopping to recapitulate the testimony in full or in detail, we have these leading features presented: Without any cause or provocation given by Pond, we find Plant, Robilliard and Blanchard combining with an expressed intention to do him personal violence. On Thursday evening this gang, with from fifteen to twenty associates, having been hunting for Pond, found him at a neighbor's, and, having got him out of doors, surrounded him, while Plant struck him with his fist, and kicked him

in the breast, with insulting language, evidently designed to draw him into a fight. He escaped from them, and ran away into the woods, and succeeded in avoiding them that night. That same night they tore down the door of the net-house, where his servants were asleep, in search of him, and not finding him there went to the house, the whole rabble being with them, and wanted Pond, and expressed themselves determined to have him; but refused to tell his wife what they wanted of him. Not finding him there, they started off elsewhere in search of him. This was between nine and ten o'clock at night. About noon of Friday, Plant and Blanchard met Pond, when Plant threatened again to whip him, and then went up to him, told him not to say anything, and that if he did he would give him slaps or kicks. Plant then took a stone in his hand, and threatened if Pond spoke to throw it at him. Pond said nothing, but went home quietly, and Plant went off and was heard making further threats soon after. Friday night neither Pond nor his family went to bed, being in fear of violence. Between one and two o'clock that night, Plant, Robilliard and Blanchard went to the net-house, and partially tore it down, while Whitney and Cull were in it. They then went to the house where Pond, his wife and children were, shook the door, and said they wanted Pond. Pond concealed himself under the bed, and his wife demanded what they wanted of him, saying he was not there, when Plant shook the door again, and ordered Mrs. Pond to open it; saying they wanted to search the house. She refusing, they resorted to artifice, asking for various articles of food, and objecting to receiving them except through the door. Plant then repeatedly commanded her to open the door, saying if she did not, she would regret it. On opening the door from six to twelve inches, by sliding the cord, to hand them some sugar, which they demanded, they did not take the sugar, but Plant seized Mrs. Pond's arm, and squeezed it until she fainted. Not succeeding in getting into the house, they then left for Ward's, and Pond went to the house of his brother-in-law, and borrowed a double-barreled shot gun loaded with pigeon shot, and returned home. While at Ward's, Blanchard told the latter that they had torn down part of Pond's net-house, and had left the rest so that when they went back they would have the rest of the fun. Blanchard also said, "I want to see Gust Pond; he abused an Irishman, and I want to abuse him just as bad as he abused the Irishman. Pond has to be abused any way."

He also said to Ward, "This is good bread, I don't know but it may be the last piece of bread I'll eat." Plant also made threats. A short time after returning, they were heard to say they were going back again; were going to find him and to whip him, or have the soul out of him." It is to be remarked that we have their language as rendered by an interpreter, who was evidently illiterate, or at least incompetent to translate into very good English, and it is impossible for us to determine the exact force of what was said.

The party then went back to Pond's, and asked admittance to search for him. His wife refused to let them in. They immediately went to the net-house, where Cull was asleep. Plant seized Cull, and pulled him out of bed on the floor, and began choking him. Cull demanded who it was, but received no answer. Blanchard and Robilliard had commenced tearing down the boards. Pond went to the door and hallooed. "Who is tearing down my net-house?" to which there was no answer. The voices of a woman and child were heard crying, and the woman's voice was heard twice to cry out "for God's sake!" Cull's voice was also heard from the net-house, not speaking, but hallooing as if he was in pain. Pond cried out loudly, "Leave, or I'll shoot." The noise continuing, he gave the same warning again, and in a few seconds shot off one barrel of the gun. Blanchard was found dead the next morning. Pond took immediate steps to surrender himself to justice.

A question was raised whether the net-house was a dwelling or a part of the dwelling of Pond. We think it was. It was near the other building, and was used not only for preserving the nets which were used in the ordinary occupation of Pond, as a fisherman, but also as a permanent dormitory for his servants. It was held in *The People v. Taylor*, 2 Mich., 250, that a fence was not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the dwelling and customary out-buildings. It is a very common thing in the newer parts of the country, where, from the nature of the materials used, a large building is not readily made, to have two or more small buildings, with one or two rooms in each, instead of a large building divided into apartments.

We can not, upon a consideration of the facts manifest from the bill of exceptions, regard the charges asked by the defense as abstract or inapplicable to the case. It was for the jury to

consider the whole chain of proof; but if they believed the evidence as spread out upon the case, we feel constrained to say that there are very few of the precedents which have shown stronger grounds of justification than those which are found here. Instead of reckless ferocity, the facts display a very commendable moderation.

Apart from its character as a dwelling, which was denied by the court below, the attack upon the net-house for the purpose of destroying it, was a violent and forcible felony. And the fact that it is a statutory and not common law felony, does not, in our view, change its character. Rape and many other of the most atrocious felonious assaults, are statutory felonies only, and yet no one ever doubted the right to resist them unto death. And a breaking into a house with the design of stealing the most trifling article, being common law burglary, was likewise allowed to be resisted in like manner, if necessary. We think there is no reason for making any distinctions between common law and statute felonies in this respect, if they are forcible and violent. So far as the manifest danger to Pond himself, and to Cull, is concerned, the justification would fall within the common law.

It is claimed by the prisoner's counsel, that we are authorized to pronounce upon the case the judgment which the facts warrant. Had the facts spread out in the bill of exceptions been found as a special verdict by the jury, this would be true. But as the case stands, we can only consider them as bearing upon the instructions given or refused. The errors being in the rulings, and not in the record outside of the bill of exceptions, we can do nothing more, in reversing the judgment, than to order a new trial. The district judge has ruled upon the law questions in such a way as to present them all fairly as questions not before decided in this state. We think there was error in requiring the actual instead of apparent and reasonably founded causes of apprehension of injury; in holding that the protection of the net-house could not be made by using a dangerous weapon; and that the conduct of the assailing party was not felonious; and also in using language calculated to mislead the jury upon the means and extent of resistance justifiable in resisting a felony.

We do not deem it necessary to pass upon the minor points, as we do not suppose the authorities will deem it important to proceed further, unless the facts are very different from those presented.

The judgment below must be reversed, and a new trial granted.

## CHAPTER IX.

### OFFENSES AGAINST THE PERSON. [CONTINUED.]

#### RAPE.

*Commonwealth v. Burke, 105 Mass. 376. (1870.)*

GRAY, J.:

The defendant has been indicted and convicted for aiding and assisting Dennis Green in committing a rape upon Joanna Caton. The single exception taken at the trial was to the refusal of the presiding judge to rule that the evidence introduced was not sufficient to warrant a verdict of guilty. The instructions given were not objected to, and are not reported in the bill of exceptions. The only question before us therefore is, whether, under any instructions applicable to the case, the evidence would support a conviction.

That evidence, which it is unnecessary to state in detail, was sufficient to authorize the jury to find that Green, with the aid and assistance of this defendant, had carnal intercourse with Mrs. Caton, without her previous assent, and while she was, as Green and the defendant both knew, so drunk as to be utterly senseless and incapable of consenting, and with such force as was necessary to effect the purpose.

All the statutes of England and of Massachusetts, and all the text books of authority, which have undertaken to define the crime of rape, have defined it as the having carnal knowledge of a woman by force and against her will. The crime consists in the enforcement of a woman without her consent. The simple question, expressed in the briefest form, is, Was the woman willing or unwilling? The earlier and more weighty authorities show that the words "against her will," in the standard definitions, mean exactly the same thing as "without her consent;" and that the distinction between these phrases, as applied to this crime, which has been suggested in some modern books, is unfounded.

The most ancient statute upon the subject is that of Westm. I. c. 13, making rape (which had been a felony at common law) a

misdemeanor, and declaring that no man should "ravish a maiden within age, neither by her own consent, nor without her consent, nor a wife or maiden of full age, nor other woman, against her will," on penalty of fine and imprisonment, either at the suit of a party or of the king. The St. of Westm. II. c. 34, ten years later, made rape felony again, and provided that if a man should "ravish a woman, married, maiden, or other woman, where she did not consent, neither before nor after," he should be punished with death, at the appeal of the party; "and likewise, where a man ravisheth a woman, married lady, maiden, or other woman, with force, although she consent afterwards," he should have a similar sentence upon prosecution in behalf of the king.

It is manifest upon the face of the Statutes of Westminster, and is recognized in the oldest commentaries and cases, that the words "without her consent" and "against her will" were used synonymously; and that the second of those statutes was intended to change the punishment only, and not the definition of the crime, upon any indictment for rape—leaving the words "against her will," as used in the first statute, an accurate part of the description. Mirror, c. 1, § 12; c. 3, § 21; c. 5, § 5. 30 & 31 Edw. I. 529-532. 22 Edw. IV. 22. Staunf. P. C. 24 a. Coke treats the two phrases as equivalent; for he says: "Rape is felony by the common law declared by parliament, for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years with her will or against her will;" although in the latter case the words of the St. of Westm. I. (as we have already seen) were "neither by her own consent, nor without her consent." 3 Inst. 60. Coke elsewhere repeatedly defines rape as "the carnal knowledge of a woman by force and against her will." Co. Lit. 123 b. 2 Inst. 180. A similar definition is given by Hale, Hawkins, Comyn, Blackstone. East and Starkie, who wrote while the Statutes of Westminster were in force; as well as by the text writers of most reputation since the St. of 9 Geo. IV. c. 31, repealed the earlier statutes, and, assuming the definition of the crime to be well established, provided simply that "every person convicted of the crime of rape shall suffer death as a felon." 1 Hale P. C. 628. 1 Hawk. c. 41. Com. Dig. Justices, S. 2. 4 Bl. Com. 210. 1 East P. C. 434. Stark. Crim. Pl. (2d ed.) 77, 431. 1 Russell on Crimes. (2d Am. ed.) 556; (7th Am. ed.) 675. 3

Chit. Crim. Law, 810. Archb. Crim. Pl. (10th ed.) 481. 1 Gabbett Crim. Law, 831. There is authority for holding that it is not even necessary that an indictment, which alleges that the defendant "feloniously did ravish and carnally know" a woman, should add the words "against her will." 1 Hale P. C. 632. *Harman v. Commonwealth*, 12 S. & R. 69. *Commonwealth v. Fogerty*, 8 Gray, 489. However that may be, the office of those words, if inserted, is simply to negative the woman's previous consent. Stark. Crim. Pl. 431 note.

In the leading modern English case of *The Queen v. Camplin*, the great majority of the English judges held that a man who gave intoxicating liquor to a girl of thirteen, for the purpose, as the jury found, "of exciting her, not with the intention of rendering her insensible, and then having sexual connection with her," and made her quite drunk, and, while she was in a state of insensibility, took advantage of it, and ravished her, was guilty of rape. It appears indeed by the judgment delivered by Patteson, J. in passing sentence, as reported in 1 Cox Crim. Cas. 220, and 1 C. & K. 746, as well by the contemporaneous notes of Parke, B., printed in a note to 1 Denison, 92, and of Alderson, B., as read by him in *The Queen v. Page*, 2 Cox Crim. Cas. 133, that the decision was influenced by its having been proved at the trial that, before the girl became insensible, the man had attempted to procure her consent, and had failed. But it further appears by those notes that Lord Denman, C. J., Parke, B., and Patteson, J., thought that the violation of any woman without her consent, while she was in a state of insensibility and had no power over her will, by a man knowing at the time that she was in that state, was a rape, whether such state was caused by him or not; for example, as Alderson, B., adds, "in the case of a woman insensibly drunk in the streets, not made so by the prisoner." And in the course of the argument this able judge himself said that it might be considered against the general presumable will of a woman that a man should have unlawful connection with her. The later decisions have established the rule in England that unlawful and forcible connection with a woman in a state of unconsciousness at the time, whether that state has been produced by the act of the prisoner or not, is presumed to be without her consent, and is rape. *The Queen v. Ryan*, 2 Cox Crim. Cas. 115. *Anon.* by Willes, J., 8 Cox Crim. Cas. 134. *Regina v. Fletcher*,

Ib. 131; S. C. Bell, 63. *Regina v. Jones*, 4 Law Times (N. S.) 154. *The Queen v. Fletcher*, Law Rep. 1 C. C. 39; S. C. 10 Cox Crim. Cas. 248. *The Queen v. Barrow*, Law Rep. 1 C. C. 156; S. C. 11 Cox Crim. Cas. 191. Although in *Regina v. Fletcher*, *ubi supra*, Lord Campbell, C. J., (ignoring the old authorities and the repealing St. of 9 Geo. IV.,) unnecessarily and erroneously assumed that the St. of Westm. II. was still in force; that it defined the crime of rape; and that there was a difference between the expressions "against her will" and "without her consent," in the definitions of this crime; none of the other cases in England have been put upon that ground, and their judicial value is not impaired by his inaccuracies.

The earliest statute of Massachusetts upon the subject was passed in 1642, and, like the English Statutes of Westminster, used "without consent" as synonymous with "against her will," as is apparent upon reading its provisions, which were as follows: 1st. "If any man shall unlawfully have carnal copulation with any woman child under ten years old, he shall be put to death, whether it were with or without the girl's consent." 2d. "If any man shall forcibly and without consent ravish any maid or woman that is lawfully married or contracted, he shall be put to death." 3d. "If any man shall ravish any maid or single woman, committing carnal copulation with her by force, against her will, that is above the age of ten years, he shall be either punished with death, or with some other grievous punishment, according to circumstances, at the discretion of the judges." 2 Mass. Col. Rec. 21. Without dwelling upon the language of the first of these provisions, which related to the abuse of female children, it is manifest that in the second and third, both of which related to the crime of rape, strictly so called, and differed only in the degree of punishment, depending upon the question whether the woman was or was not married or engaged to be married, the legislature used the words "without consent," in the second provision, as precisely equivalent to "against her will," in the third. The later revisions of the statute have abolished the difference in punishment, and therefore omitted the second provision, and thus made the definition of rape in all cases the ravishing and carnally knowing a woman "by force and against her will." Mass. Col. Laws, (ed. 1660) 9; (ed. 1672) 15. Mass. Prov. Laws, 1692-3 (4 W. & M.) c. 19, § 11; 1697 (9 W. III.) c. 18; (State ed.)



56, 296. St. 1805, c. 97, § 1. Rev. Sts. c. 125, § 18. Gen. Sts. c. 160, § 26. But they cannot, upon any proper rule of construction of a series of statutes *in pari materia*, be taken to have changed the description of the offence. *Commonwealth v. Sugland*, 4 Gray, 7. *Commonwealth v. Bailey*, 13 Allen, 541, 545.

We are therefore unanimously of opinion that the crime, which the evidence in this case tended to prove, of a man's having carnal intercourse with a woman, without her consent, while she was as he knew, wholly insensible so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was rape. If it were otherwise, any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take even by the defendant himself, would be unprotected from personal dishonor. The law is not open to such a reproach.

*Exceptions overruled.*

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#### FALSE IMPRISONMENT AND KIDNAPPING.

*Click v. State*, 3 Texas, 282. (1848.)

The appellant was indicted upon a charge of kidnapping, at the Fall Term, 1847. The indictment charges that the defendant, "on the first day of June, in the year of our Lord eighteen hundred and forty-seven, with force and arms, in said county, one Samuel Hinton, in the peace of God and of the State. then and there being, did forcibly seize, steal, take and carry away, and kidnap, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State."

At the Spring Term, 1848, the accused was arraigned and pleaded *not guilty*. At the Fall Term thereafter, he moved the court to quash the indictment for causes specified in the motion. But the court refused the motion. There was a trial and verdict of *guilty*. The defendant then moved in arrest of judgment, and assigned the following causes:

"1st. No assault is averred to have been committed upon the said Hinton.

"2d. There is in the indictment no allegation that said Hinton was taken against his will, or without his consent.

"3d. There is no allegation that the taking was unlawful, or without process of law.

"4th. The purpose or object for which said Hinton was taken, is not set forth.

"5th. The facts and circumstances which constitute the offence of kidnapping are not set forth in said indictment; but only the generic term of kidnapping is used.

"6th. The indictment is double, uncertain and repugnant."

The motion in arrest of judgment was overruled, and the defendant appealed.

Mr. Justice WHEELER, after stating the facts, delivered the Opinion of the Court. Justice LIPSCOMB not sitting.

For the appellant, it is insisted that the court erred:

1st. In refusing to quash the indictment.

2d. In overruling the motion in arrest of judgment.

1. As the motion in arrest of judgment appears to embrace all the grounds which could be available to the defendant upon a revision of the motion to quash, it is unnecessary to consider the latter, except to observe, that a motion to quash an indictment is always addressed to the discretion of the court. (1 Chit. Cr. L., 299, 301; Whart. Cr. L. 131.) And the court will grant or refuse the motion, as in its discretion it may deem proper; being guided in the exercise of that discretion by certain rules. (1 Chit. C. L. 299.)

Where the application is made on the part of the defendant, the English courts, it is said, have almost uniformly refused to quash an indictment when it appeared to be for some enormous crime; and they have also, in a great many instances, refused to quash indictments for minor offences. (Whart. Am. Cr. L. 131.) It is in the discretion of the court to quash an indictment for insufficiency, or put the party to a motion in arrest of judgment. But when the question is doubtful, the court will refuse to quash the indictment. (Ib.) The court will not quash an indictment except in a very clear case, (Ib.; 4 Yeates, 69; 1 Murph. 213), but will put the party to a demurrer, or motion in arrest of judgment. "The court is under no legal obligation to quash a defective indictment on motion before the trial is concluded, as the party indicted has his remedy by a demurrer, or by a motion in arrest of judgment." (10 Shep. 191.)

"When the motion is made on the part of the defendant, says

Mr. Chitty, the rules by which the court is guided are more strict, and their objections are more numerous; because, if the indictment be quashed, the recognizances will become ineffectual; and the courts usually refuse to quash on the application of the defendant when the indictment is for a serious offence, unless upon the clearest and plainest ground, but will drive the party to a demurrer, or motion in arrest of judgment, or writ of error." (1 Chit. C. L. 300.)

The application, it is said, if made on the part of the defendant, must be made before plea. (Whart. Cr. L. 132.) But in some of the American courts, the practice is always to permit the plea of not guilty to be withdrawn, in order to hear a motion to quash. (2 South. 539.) This, however, is a matter entirely within the discretion of the court; it being a rule which the discretion of the courts has adopted for their guidance, and from which, of course, they may vary. (1 Chit. C. L. 303.)

2d. In order to determine the sufficiency of the indictment, to which alone the motion in arrest of judgment is directed, it becomes necessary to recur to the definition and description of the offence charged.

At the time of the alleged commission of the offence, and of the finding of this indictment, there was no statutory definition, or express recognition of the crime of kidnapping. It is to the Common Law alone, therefore, that we must look to test the sufficiency of the definition and description of the offence contained in this indictment.

Kidnapping is defined to be, "the forcible abduction and conveying away of a man, woman or child, from their own country, and sending them to another." (2 Tom. L. Dic., 335; 4 Bl. Com. 219; 1 East. P. C. 430, S. 4.)

This offence is treated as an aggravated species of false imprisonment. (Roscoe on Ev. 465; 1 East. P. C. 430.) And all the ingredients in the definition of the latter offence are necessarily comprehended in the former.

These are: "1. The detention of the person. 2d. The unlawfulness of such detention. Every confinement of the person is an imprisonment." "Unlawful, or false imprisonment consists in such confinement or detention without sufficient authority." 3 Bl. Com. 127; 1 Tom. L. Dic. 755. These essential elements in the definition of the offence must enter into the descrip-

tion of it in the indictment. And to constitute it the offence of kidnapping, proper at Common Law, another circumstance would seem to be necessary, viz.: that of sending away the person, upon whom the offence is committed, from his own country into another. In East's Pleas of the Crown, p. 430, it is said "the forcible abduction, or stealing and carrying away of any person is greatly aggravated *by sending them away from their own country into another, properly called kidnapping.*" If this latter be an essential ingredient in the offence of kidnapping, the present indictment must be defective in not containing this averment. The only precedents of indictments for kidnapping at Common Law, to which we have had reference, contain this averment. And so far as the precedents may be regarded as furnishing evidence of what was deemed necessary, or at least proper, in an indictment for this offence at the Common Law, the requisites as deducible from them would seem to be: 1st. An averment of an assault. 2d. The carrying away or transporting of the party injured from his own country into another, unlawfully, and against his will. (1 Tremain's Pleas of the Crown, 216.)

But if this transportation, or carrying away from his own country into another, be not necessary to constitute the offence, or if the offence intended to be charged in the present indictment, be not properly kidnapping, but that of the abduction or "stealing and carrying away, or secreting of the person upon whom it is alleged to have been committed, *sometimes called kidnapping.*" still it amounts to, at least, an aggravated species of false imprisonment (Ib.), and the indictment must contain every averment necessary to the description of that offence.—The unlawfulness, or the want of lawful authority, we have seen is one of the circumstances necessary to constitute the offence, and it is no where averred in the present indictment. The omission cannot be supplied by the conclusion of the indictment "*contrary to the form of the statutes,*" for it is founded on no statute and can only be sustained as a good indictment at Common Law, by rejecting the conclusion as surplusage, (Whart. Am. Cr. L. 105, 6, no. 3; 1 Chit. Cr. L. 290.)

To constitute the crime of kidnapping, the asportation or conveying away must have been against the will and without the consent of the party injured, and without any lawful warrant or authority therefor, and these essential circumstances descriptive

of the offence charged, should appear by averment in the indictment. (3 Chit. C. L. 835 to 841.) Under the present indictment, the defendant could not have been convicted of the less offence of an assault, for the reason that no assault is charged to have been committed by him. "The rule, it has been said, that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence." (7 Cranch, 389.)

The words employed in this indictment are not descriptive of the offence of kidnapping at Common Law, however they might be of the offence inhibited by some of the numerous statutes in England enacted for the punishment of the abduction, stealing or secreting of men, women and children. It is not sufficient to charge the defendant in this case with *kidnapping* generally, for he cannot be thereby apprised of the facts he will be required to answer. But the indictment should state specifically the facts and circumstances which constitute that offence. This not having been done in the case before us, we are of opinion that the indictment is defective and insufficient, and does not support the conviction had, or authorize a judgment of condemnation upon it; and that the motion in arrest of judgment, for this cause, ought to have been sustained.

The judgment must therefore be reversed, and the cause remanded for further proceedings.

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#### ASSAULT AND BATTERY.

*Kirland v. State, 43 Ind. 146. (1873.)*

BUSKIRK, J.:

This was a prosecution for an assault and battery commenced before a justice of the peace. The affidavit charges the appellant with having, at Marion county, on the 28th day of February, 1873, unlawfully, and in a rude, insolent, and angry manner, touched, etc., Charles Bein.

The appellant was tried and found guilty by the justice. The case was appealed. It was tried on appeal in the Marion Criminal Court, where the State again obtained a verdict. The appellant

moved for a new trial, which was overruled, and the judgment was rendered on the verdict.

The error assigned is the overruling of the motion for a new trial. A reversal of the judgment is asked mainly upon the ground that the court gave an erroneous instruction to the jury.

The instruction complained of as erroneous is as follows:

"2. To constitute a battery, the touching need not be of great force; a mere touching is sufficient, if it be unlawful and be done in a rude, or an insolent, or angry manner. But this touching must be unlawful. A man may defend the possession of his estate and of his chattels by such reasonable force as may be necessary to that end; and if, in this case, you believe from the evidence, that at the time of the alleged assault and battery, Charles Bein was trespassing upon the lands of the defendant, and engaged in carrying away without right the corn of the defendant, the defendant had the right, after requesting Bein to depart, and a refusal on his part to leave the property and premises, to use such reasonable force as was necessary to eject him from the premises and protect his personal property; and if the defendant, in thus protecting his property and possession, touched Bein or assaulted him only so much as was reasonably necessary to secure the object aforesaid, he is not guilty, and you should so find. But if the jury believe from the evidence, that defendant rented the fields referred to in the evidence, no certain time being fixed for the termination of the lease, to Charley Bein, to be cultivated in corn, upon the shares, to be gathered by Bein, one-half to be delivered to defendant, and the other to be retained by the renter or tenant for his share, the mere fact that an agreement was made in the fall after, by which it was agreed that the tenant (Bein) take for his share of the corn the south field, and defendant the north field as his share, except three acres in the south field, this would not terminate the lease of itself, unless it was agreed between the parties that the lease should terminate. Nor would such facts authorize the defendant to forcibly eject Bein from the field because he was gathering more corn for his own use than he was entitled to by such agreement; and if, under such circumstances, the defendant struck or beat Bein, while he was gathering corn in the field, or while Bein was driving his team in the field in the act of gathering the corn, the defendant struck and beat his horses in a rude and angry manner with a stick, the defendant is guilty of an assault and battery."

The Statute says: "Every person who in a rude, insolent or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery," etc. 2 G. & H. 459.

It is quite clear, therefore, that no assault and battery can be committed, unless one person touches another person unlawfully, and in a rude, or insolent, or angry manner. The affidavit charges that the appellant thus touched Charles Bein. To sustain this charge, the evidence must show the unlawful touching, etc., of Charles Bein. The charge excepted to, however, instructs the jury, that, if the defendant struck Charles Bein's horses with a club, in a rude and angry manner, while Bein was driving his team, in the act of gathering corn, etc., the defendant is guilty of an assault and battery. In this instruction the court deems the touching of Bein wholly immaterial and unimportant; to strike Bein's horses is to strike him, that is, if they were struck with a club, and it was done while he was driving his team in the field, in the act of gathering corn. To strike the horses of Bein was in no legal or logical sense to strike him. True, if the blow touched both Bein and his horse, the touching would be an assault and battery on Bein, not because of the touching of his horse, however, but for the reason that it touched him.

And if the appellant struck and drove Bein's horse, or any other horse, against him violently, unlawfully, and in a rude, etc., manner, then he would be guilty, not because he struck the horse, but for the reason that he struck Bein by running or pushing the horse against him. If Bein was so connected with his horses when they were struck, that the blow took effect on his person as well as that of the horses, then the person striking the blow would be guilty.

Bishop, in his work on Criminal Law, in sec. 72, vol. 2, says: "The slightest unlawful touching of another, especially if done in anger, is sufficient to constitute a battery. For example, spitting in a man's face, or on his body, or throwing water on him, is such. And the inviolability of the person, in this respect, extends to every thing attached to it."

Russell, on Crimes, vol. 1, p. 751, says: "The injury need not be effected directly by the hand of the party. Thus there may be an assault by encouraging a dog to bite. \* \* \* And it seems that it is not necessary that the assault should be immediate; as where the defendant threw a lighted squib into a market-place,

which, being tossed from hand to hand, by different persons, at last hit the plaintiff in the face, and put out his eye, it was adjudged that this was actionable as an assault and battery. And the same has been holden where a person pushed a drunken man against another."

Greenleaf on Evidence, in discussing the question of battery, says: "A battery is the actual infliction of violence on the person. This averment will be proved by evidence of any unlawful touching of the person of the plaintiff, whether by the defendant himself, or by any substance put in motion by him. The degree of violence is not regarded in the law; it is only considered by the jury, in assessing the damages in a civil action, or by the judge in passing sentence upon indictment. Thus, any touching of the person in an angry, revengeful, rude, or insolent manner; spitting upon the person; jostling him out of the way; pushing another against him; throwing a squib or any missile, or water upon him; striking the horse he is riding, whereby he is thrown; taking hold of his clothes in an angry or insolent manner, to detain him, is a battery. So, striking the skirt of his coat or the cane in his hand, is a battery. For anything attached to his person partakes of its inviolability."

Blackstone defines a battery as follows:

"3. By battery, which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner." 3 Cooley's Blackstone, 120.

Note 4 by Judge Cooley, on same page, reads as follows: "A battery is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him. 1 Saund. 29, b. n. 1.; id. 13 and 14, n. 3. Taking a hat off the head of another is no battery. 1 Saund. 14. It must be either wilfully committed, or proceed from want of due care: Stra. 596; Hob. 134; Plowd. 19; otherwise it is *damnum absque injuria*, and the party aggrieved is without remedy: 3 Wils. 303; Bac. Ab. assault and battery, B.; but the absence of intention to commit the injury constitutes no excuse, where there has been a want of due care. Stra. 596. Hob. 134. Plowd. 19. But if a person



unintentionally push against another in the street, or if without any default in the rider a horse runs away and goes against another, no action lies. 4 Mod. 405: Every battery includes an assault: Co. Litt. 253; and the plaintiff may recover for the assault only, though he declares for an assault and battery. 4 Mod. 405."

Counsel for appellee have referred us to the following adjudged cases as supporting the instruction under examination; *Respublica v. De Longchamps*, 1 Dallas, 111; *The State v. Davis*, 1 Hill S. C. 46; *Dubuc De Marentille v. Oliver*, Penning, 379; *The United States v. Ortega*, 4 Wash. C. C. 531.

The case referred to in Dallas was a prosecution under the laws of nations for an assault and battery upon the Minister of the French Government resident in this country. It was proved upon the trial that the defendant struck with a cane the cane of the French Minister. The court say: "As to the assault, this is, perhaps, one of the kind, in which the insult is more to be considered than the actual damage; for though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of assault and battery, and among gentlemen, too often induce duelling, and terminate in murder. As, therefore, anything attached to the person, partakes of its inviolability; De Longchamps' striking Monsieur Marbois' cane, is a sufficient justification of that gentleman's subsequent conduct."

The case referred to in Pennington, *supra*, was a civil action for a trespass committed by the defendant on the property of the plaintiff, by striking with a large club the plaintiff's horse, which was before a carriage in which the plaintiff was riding. The court say: "To attack and strike with a club, with violence, the horse before a carriage, in which a person is riding, strikes me as an assault on the person; and if so, the justice had no jurisdiction of the action. But if this is to be considered as a trespass on property, unconnected with an assault on the person, I think it was incumbent on the plaintiff below, to state an injury done to the horse, whereby the plaintiff suffered damage; that he was in consequence of the blow bruised or wounded, and unable to perform service; or that the plaintiff had been put to expense in curing of him or the like."

The above case being an action of trespass for an injury to the

horse of the plaintiff and not a prosecution for an assault, or an assault and battery upon the person of the plaintiff, we think that but little importance should be attached, or weight given to the loose remark of the judge, that the striking of a horse attached to a carriage was an assault upon the person riding in the carriage.

The case of *The State v. Davis, supra*, was a prosecution for an assault upon an officer, in releasing from his custody a negro. The facts will sufficiently appear from the quotation which we make from the opinion of the court. The court say:

"The general rule is, that any attempt to do violence to the person of another, in a rude, angry, or resentful manner, is an assault; and raising a stick or fist, within striking distance, pointing a gun within the distance it will carry, spitting in one's face, and the like, are the instances usually put by way of illustration. No actual violence is done to the person in any one of these instances; and I take it as very clear that that is not necessary to an assault. It has, therefore, been held that beating a horse in which one is, striking violently a stick, which he holds in his hand, or the horse on which he rides, is an assault; the thing in these instances partaking of the personal inviolability. *Respublica v. De Longchamps*, 1 Dall. 114; *Wambough v. Shank*, Penning. 229, cited in 2 part Esp. Dig. 173.

"What was the case here? Laying the right of property in the negro out of the question, the prosecutor was in possession, and legally speaking, the defendants had no right to retake him with force. As far as words could go, their conduct was rude and violent, in the extreme. They broke the chain with which the negro was confined to the bed-post, in which the prosecutor slept, and cut the rope by which he was confined to his person, and are clearly within the rule. The rope was as much identified with his person, as the hat or coat which he wore, or the stick which he held in his hand. The conviction was therefore right."

We are inclined to the opinion that the chain and rope so connected together the prosecutor and negro, as to make the identification as complete as the hat or coat on the person or the stick in the hand. The ruling in the above case was based upon the close and intimate connection which existed between the prosecutor and the negro; but no such identity or connection between the prosecutor and his horses in the case in judgment is shown.

The case of *The United States v. Ortega, supra*, was a prosecu-

tion instituted by the United States, for the purpose of vindicating the law of nations and of the United States, offended, as was alleged, in the person of a foreign minister, by an assault committed on him by the defendant. The proof was, that the defendant seized hold of the breast of the coat of Mr. Salmon, the prosecuting witness, and retained his hold while he enumerated his cause of grievance, and until a third person came up and compelled him to release his hold.

The court said: "It was argued by the counsel for the defendant, that, to constitute an assault, it must be accompanied by some act of violence. The mere taking hold of the coat, or laying the hand gently upon the person of another, it is said, does not amount to this offence; and that nothing more is proved in this case, even by Mr. Salmon. It is very true that these acts may be done, very innocently, without offending the law. If done in friendship, for a benevolent purpose, and the like, the act would certainly not amount to an assault. But these acts, if done in anger, or a rude and insolent manner, or with a view to hostility, amount, not only to an assault, but to a battery. Even striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist at him, if done in anger, or in a menacing manner, are considered by the law as assaults."

It is very obvious that the above cases do not support the position assumed by the counsel for appellee, but are in entire accord with the elementary writers from whom we have quoted.

The most accurate and complete definition of a battery that we have met with is that given by Saunders, and which has been adopted by most subsequent writers, and that is: "A battery is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him." By this definition, it is an essential pre-requisite that the person must either be touched by the aggressor himself or by the substance put in motion by him. There must be a touching of the person. One's wearing apparel is so intimately connected with the person, as in law to be regarded, in case of a battery, as a part of the person. So is a cane when in the hand of the person assaulted.

But in the case under consideration, the court ignores all these things and instructs the jury to convict on proof alone of the striking of the horses of the prosecuting witness. It is not even necessary, according to this charge, that the prosecuting witness

should have been in the wagon or holding the lines, or connected with or attached to the horses in any way. That Bein was driving his team and gathering his corn does not necessarily so connect him with the horses that the touching of the horses would be an assault and battery on him. He may have been, as is frequently done, driving his horses from one pile of corn to another, by words of command, without being in the wagon or having hold of the lines.

The law was correctly stated by the court in the first charge given to the jury. It was as follows: "Before you will be justified in finding the defendant guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant, at, etc., \* \* \* in a rude, or an insolent, or an angry manner, touched Charles Bein."

In placing a construction upon the instruction complained of, it is our duty to look at all the instructions given on the same subject; and, if the instructions taken together present the law correctly and are not calculated to mislead the jury, we should affirm the judgment.

On the other hand, if the two charges are inconsistent with each other, if they were calculated to confuse and mislead the jury, or if they must have left the jury in doubt or uncertainty as to what was the law as applicable to the facts of the case, then the judgment should be reversed. *Somers v. Pumphrey*, 24 Ind. 231. The above rules have been applied by this court in civil cases. The rule laid down in criminal causes is as follows: "An erroneous instruction to the jury in a criminal case cannot be corrected by another instruction, which states the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury." *Bradley v. The State*, 31 Ind. 492.

Construing these charges together, how do they stand? The jury are first told that, to justify a finding of guilty, they must be satisfied beyond a reasonable doubt that the defendant touched Charles Bein: and then, in the second charge, the court continues, that the defendant might lawfully employ reasonable force, etc., in defence of his possession or property, but that under circumstances hypothetically put by the court, Charles Bein had the right to be on the defendant's premises gathering corn," and if under such circumstances, etc., while Bein was driving his team in the field in the act of gathering the corn, the defendant struck

and beat his horses in a rude and angry manner, with a stick, the defendant is guilty of an assault and battery."

Plainly, then, the charge is that the evidence must show the touching of Charles Bein by the defendant, but that if Bein is driving his team, etc., and the defendant strikes his horses (that is Bein's horses) with a stick, in a rude and angry manner, then, such touching of the horses is, in law, a touching of Bein, and the defendant is guilty of an assault and battery. Logically the charge states the law thus: Generally, to sustain a charge of assault and battery on A., it is essential to prove a touching of A. by the defendant, but under certain circumstances, such as if A. is driving his team, etc., and the defendant touches the horses of A., then, in that case, such touching of the horses is a touching of A., and if such touching of the horses is unlawfully done and was made, etc., then the defendant may be found guilty of an assault and battery on A.

There was evidence tending to prove that the defendant struck Charles Bein. He and his two sons, Edward and Frank, so swear. The defendant swears he did not.

The following is briefly the evidence tending to prove the assault and battery upon the horses:

Charles Bein testified: "He hit my horses on the head with a big club about three feet long. \* \* \* He struck my horses two or three times. \* \* \* He was mad. \* \* \* I was loading corn out of the piles; was loading up corn when he struck the horses."

Same witness on cross-examination testifies: "When he struck the horses, he struck them on the head, and they stopped, etc. Don't know who held the lines. Maybe my little boy held one and me the other. \* \* \* He struck the horse next to me. \* \* \* The team was made to stand when defendant struck the horses. \* \* \* I was not in the wagon when he struck them."

Edward Bein testified: "Kirland hit the horses on the head, and they stopped. We were just going to drive out. My father was then standing on the ground near the wagon. Defendant put his hands on the horses to unhitch them from the wagon; tried to unhitch the traces. Just before that he struck the horses, when father was standing on the other side of the wagon."

Frank Bein testified: "At the time the horses were struck, father was in the wagon."

The defendant testifies, that he "didn't touch the horses, except that he attempted to unhitch them from the wagon."

It is apparent that there was evidence in the case to which the second instruction was applicable. The verdict being general we are unable to determine whether he was convicted for touching the person of Bein or for striking his horses. It may be that the jury found the defendant guilty of striking the horses of Bein, for the defendant admitted that he attempted to unhitch the horses from the wagon, and consequently must have touched them, while he positively denies that he touched the person of the prosecuting witness. Besides, there was evidence tending to impeach the character of Bein. The jury may, therefore, have doubted, reasonably, the guilt of the defendant in the striking of Bein, and found him guilty only of having "in a rude and angry manner struck the horses of Bein with a stick," while "he was driving his team in the act of gathering corn."

The second instruction was inapplicable to the evidence and was calculated to mislead the jury, and being erroneous, the judgment should be reversed.

The judgment is reversed; and the cause is remanded, for a new trial in accordance with this opinion.

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MAYHEM.

*State v. Johnson, 58 Ohio St. 417. (1898.)*

MINSHALL, J.:

David Johnson was prosecuted on an indictment presented by the grand jury of the county, framed on the provisions of section 6819, Revised Statutes. The section, so far as it is applicable to this case, is as follows: "Whoever with malicious intent to maim or disfigure, cuts, bites, or slits the nose, ear or lip, cuts or disables the tongue, puts out or destroys an eye, cuts off or disables a limb or any member of another person" is declared guilty of an offence punishable by imprisonment in the penitentiary. The indictment contained two counts. In the first it was charged that he maliciously "did bite the ear of one Reuben Mitchell with intent to

disfigure," and, in the second, that he maliciously "did bite the ear of one Reuben Mitchell with intent to maim." A demurrer was sustained to the second count, and, on a plea of not guilty, he was acquitted on the first count. The prosecuting attorney took a bill of exceptions to the ruling on the demurrer to the second count, and prosecutes the same here under the provisions of the statute in that regard, to test the accuracy of the ruling.

The demurrer presents the question whether the malicious biting of the ear of another can be charged as done with intent to maim.

There is no question, we think, but that maim as a noun, and mayhem are equivalent words, or that maim is but a newer form of the word mayhem—the difference being in the orthography and not in the sense. Webster's Unabridged Dictionary: "Maim," as a noun, is there defined the same as mayhem: "The privation of the use of a limb or member of the body by which one is rendered unable to defend himself or to annoy his adversary." This is the definition of mayhem at common law. 1 East, P. C. 393; 1 Whar. Cr. Law, section 581. Hence the verb "to maim" is accurately defined in Anderson's Law Dictionary, as follows: "To commit mayhem." So, at common law, whatever the injury to any member of the body might be, if it did not permanently affect the physical ability of the person to defend himself or annoy his adversary, it did not amount to mayhem. Neither the biting of an ear nor the slitting of the nose was regarded as an injury of this character. Clark's Cr. Law, 182; 3 Bl. Com. 121. The outrage upon Sir John Coventry, who had been set upon in the street and his nose slit, for words spoken in Parliament, led to the adoption of what is known as the Coventry Act, 22 and 23 Char. II. This act made it a felony without benefit of clergy, where any one unlawfully cut out or disabled the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disabled any limb or member of any other person, with intent to maim or disfigure him. 4 Bl. Com. 206. Our statute is substantially the same. Any of the injuries there named, done with the intent "to maim or disfigure" is punishable by imprisonment in the penitentiary. Whether it be the biting of an ear, or the putting out of an eye, or the cutting off of a hand, each is alike regarded as a crime and punished the same way; or, in other words, each is of the same degree of criminality. Section 7316, Revised Statutes.

The question in the case is, whether the second count in the

indictment charges an offence against the laws of the State? It does not for reasons stated charge a maiming. Then does it charge the offence of biting the ear with intent to disfigure? Such intent is not averred in the count; and, unless the intent to maim includes the intent to disfigure, there can be no conviction on the second count for such an offence. Evidence of an intention to disfigure would be a fatal variance from the intent laid in the count. The intent in this case must depend upon the nature of the injury, in connection with the character of the member on which it is inflicted. If the member be not one of use to the person in defending himself, an injury to it cannot be said to have been done with intent to maim. It is provided, among other things, in section 7316, Revised Statutes, that: "When the indictment charges an offence including different degrees, the jury may find the defendant not guilty of the degree charged and guilty of an inferior degree." In *Barber v. State*, 39 Ohio St. 660, it was held that the offence of cutting with intent to *kill*, and that of cutting with intent to *wound* are offences of the same degree, under the provisions of section 6820, Revised Statutes, making it an offence for any one to cut another person "with intent to kill, wound or maim." The indictment charged a cutting with intent to kill; the verdict of the jury was, "guilty of cutting with intent to wound." The court held that the indictment was not supported by the verdict, for the reason that the offence of cutting with intent to wound is not an offence inferior in degree to that of cutting with intent to kill. By a parity of reasoning it follows that the unlawful biting of the ear with intent to disfigure is not an offence inferior to that of biting it with intent to maim; and an indictment charging the biting to have been done with intent to maim, would not be supported by evidence of an intent to disfigure—there would in such case, be a material variance between the proof and the allegation.

But this does not exhaust the inquiry, for the question remains, does the count charge any offence against the laws of the State, if so the court erred in sustaining a demurrer to it. Now, it seems apparent that the malicious biting of the ear of another, whether to maim or disfigure, amounts to an assault and battery—an offence inferior in degree to an assault with intent to maim or disfigure—the offence charged being simply an aggravated form of assault and battery of which the defendant could have been



convicted on the count demurred to, on proof of such an offence. *Heller v. State*, 23 Ohio St. 582; *Barber v. State*, *supra*, 3 Bl. Com. 121.

For this reason the court erred in sustaining a demurrer to it.

*Exceptions sustained.*

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#### CRIMINAL LIBEL.

*Commonwealth v. Chapman*, 13 Met. (Mass.) 68. (1847.)

SHAW, C. J.:

This was an indictment against the defendants for a false and malicious libel, tried before the court of common pleas, and, upon a conviction there, the case is brought before this court, upon an exception which has been most elaborately argued by the learned counsel for the defendants, and which, if sustained, must go to the foundation of the prosecution; namely, that there is no law of this Commonwealth by which the writing and publishing of a malicious libel can be prosecuted by indictment, and punished as an offence. The proposition struck us with great surprise, as a most startling one; but as it was seriously presented and earnestly urged in argument, we felt bound to listen, and give it the most careful consideration; but after the fullest deliberation, we are constrained to say, that we can entertain no more doubt upon the point than we did when it was first offered.

It is true that there is no statute of the Commonwealth declaring the writing or publishing of a written libel, or a malicious libel by signs and pictures, a punishable offence. But this goes little way towards settling the question. A great part of the municipal law of Massachusetts, both civil and criminal, is an unwritten and traditionary law. It has been common to denominate this "the common law of England," because it is no doubt true that a large portion of it has been derived from the laws of England, either the common law of England, or those English statutes passed before the emigration of our ancestors, and constituting a part of that law, by which, as English subjects, they were governed when they emigrated; or statutes made afterwards, of a general nature, in amendment or modification of the common law, which were adopted in the colony or province by general consent.

In addition to these sources of unwritten law, some usages, growing out of the peculiar situation and exigencies of the earlier settlers of Massachusetts, not traceable to any written statute or ordinance, but adopted by general consent, have long had the force of law; as, for instance, the convenient practice, by which, if a married woman join with her husband in a deed conveying land of which she is seized in her own right, and simply acknowledge it before a magistrate, it shall be valid to pass her land, without the more expensive process of a fine, required by the common law. Indeed, considering all these sources of unwritten and traditional law, it is now more accurate, instead of the common law of England, which constitutes a part of it, to call it collectively the common law of Massachusetts.

To a very great extent, the unwritten law constitutes the basis of our jurisprudence, and furnishes the rules by which public and private rights are established and secured, the social relations of all persons regulated, their rights, duties, and obligations determined, and all violations of duty redressed and punished. Without its aid, the written law, embracing the constitution and statute laws, would constitute but a lame, partial, and impracticable system. Even in many cases, where statutes have been made in respect to particular subjects, they could not be carried into effect, and must remain a dead letter, without the aid of the common law. In cases of murder and manslaughter, the statute declares the punishment; but what acts shall constitute murder, what manslaughter, or what justifiable or excusable homicide, are left to be decided by the rules and principles of the common law. So, if an act is made criminal, but no mode of prosecution is directed, or no punishment provided, the common law furnishes its ready aid, prescribing the mode of prosecution by indictment, the common law punishment of fine and imprisonment. Indeed, it seems to be too obvious to require argument, that without the common law, our legislation and jurisprudence would be impotent, and wholly deficient in completeness and symmetry, as a system of municipal law.

It will not be necessary here to consider at large the sources of the unwritten law, its authority as a binding rule, derived from long and general acquiescence, its provisions, limits, qualifications, and exceptions, as established by well authenticated usage and tradition. It is sufficient to refer to 1 Bl. Com. 63 & *seq.*

If it be asked, "how are these customs or maxims, constituting the common law, to be known, and by whom is their validity to be determined?" Blackstone furnishes the answer: "by the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study," "and from being long personally accustomed to the judicial decisions of their predecessors." 1 Bl. Com. 69.

Of course, in coming to any such decision, judges are bound to resort to the best sources of instruction, such as the records of courts of justice, well authenticated histories of trials, and books of reports, digests, and brief statements of such decisions, prepared by suitable persons, and the treatises of sages of the profession, whose works have an established reputation for correctness.

That there is such a thing as a common or unwritten law of Massachusetts, and that, when it can be authentically established and sustained, it is of equal authority and binding force with the statute law, seems not seriously contested in the argument before us. But it is urged that, in the range and scope of this unwritten law, there is no provision, which renders the writing or publishing of a malicious libel punishable as a criminal offence.

The stress of the argument of the learned counsel is derived from a supposed qualification of the general proposition in the constitution of Massachusetts, usually relied on in proof of the continuance in force of the rules and principles of the common law, as they existed before the adoption of the constitution. The clause is this: Chap. 6, Art. 1, Sect. 6: "All the laws which have been adopted, used and approved in the province, colony or state of Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution."

It is then argued, that it is in virtue of this clause of the constitution, that the common law of England, and all other laws existing before the revolution, remain in force, and that this clause so far modifies the general proposition, that no laws are saved, but those which have been actually applied to cases in judgment in a court of legal proceeding; and unless it can be shown affirmatively that some judgment has been rendered, at some time

before the adoption of the constitution, affirmative of any particular rule or principle of the common law, such rule is not brought within the saving power of this clause, and cannot therefore be shown to exist. We doubt the soundness of this proposition, and the correctness of the conclusion drawn from it.

We do not accede to the proposition, that the present existence and effect of the whole body of law, which existed before the constitution, depends solely upon this provision of it. We take it to be a well settled principle, acknowledged by all civilized States governed by law, that by means of a political revolution, by which the political organization is changed, the municipal laws, regulating their social relations, duties and rights, are not necessarily abrogated. They remain in force, except so far as they are repealed or modified by the new sovereign authority. Indeed, the existence of this body of laws, and the social and personal rights dependent upon them, from 1776, when the Declaration of Independence was made, and our political revolution took place, to 1780, when this constitution was adopted, depend on this principle. The clause in the constitution, therefore, though highly proper and expedient to remove doubts, and give greater assurance to the cautious and timid, was not necessary to preserve all prior laws in force, and was rather declaratory of an existing rule, than the enactment of a new one. We think, therefore, it should have such a construction, as best to carry into effect the great principle it was intended to establish.

But further; we think the argument is unsound in assuming that no rule of the common law can be established under this clause of the constitution, without showing affirmatively, that in some judicial proceeding, such rule of law has been drawn in question and affirmed, previously to the adoption of the constitution. During that time there were no published reports of judicial proceedings. The records of courts were very imperfectly kept, and afford but little information in regard to the rules of law discussed and adopted in them. And who has examined all the records of all the criminal courts of Massachusetts, and can declare that no records of such prosecutions can be found? But so far as it regards libel, as a criminal offence, we think it does appear, from the very full and careful examination of the late Judge Thacher (*Commonwealth v. Whitmarsh*, Thacher's Crim. Cases, 441), that many prosecutions for libel were instituted in the criminal courts

before the revolution, and none were ever quashed or otherwise disposed of, on the ground that there was no law rendering libels punishable. In the case of the indictments returned against Governor Gage and others, very much against the will of the judges, those indictments were received and filed, and remained, until non prossed by the king's attorney general. This investigation of the history of the common law of Massachusetts is so thorough, complete and satisfactory, that it is sufficient to refer to it, as a clear elucidation of the subject.

But we think there is another species of evidence to prove the existence of the common law, making libel an offence punishable by law, clear satisfactory and decisive; and that is, these rules of law, with some modification, caused by the provisions of the constitution, have been affirmed, declared, and ratified by the judiciary and the legislative departments of the existing government of Massachusetts, by those whose appropriate province and constitutional duty it was to act and decide upon them; so that they now stand upon a basis of authority which cannot be shaken, and must so stand until altered or modified by the legislature.

When our ancestors first settled this country, they came here as English subjects; they settled on the land as English territory, constituting part of the realm of England, and of course governed by its laws; they accepted charters from the English government, conferring both political powers and civil privileges; and they never ceased to acknowledge themselves English subjects, and never ceased to claim the rights and privileges of English subjects, till the revolution. It is not, therefore, perhaps, so accurate to say that they established the laws of England here, as to say, that they were subject to the laws of England. When they left one portion of its territory, they were alike subject, on their transit and when they arrived at another portion of the English territory; and therefore always, till the Declaration of Independence, they were governed and protected by the laws of England, so far as those laws were applicable to their state and condition. Under this category must come all municipal laws regulating and securing the rights of real and personal property, of person and personal liberty, of habitation, of reputation and character, and of peace. The laws designed for the protection of reputation and character, and to prevent private quarrels, affrays and breaches of peace, by punishing malicious libel, were as important and as

applicable to the state and condition of the colonists, as the law punishing violations of the rights of property, of person, or of habitation; that is, as laws for punishing larceny, assault and battery, or burglary. Being part of the common law of England, applicable to the state and condition of the colonists, they necessarily applied to all English subjects and territories, as well in America as in Great Britain, and so continued applicable till the Declaration of Independence.

This, therefore, would be evidence, *a priori*, that they were in force, and were adopted by the clause cited from the constitution, except so far as modified by the excepting clause.

That the law of libel existed, at the first migration of our ancestors, and during the whole period of the colonial and provincial governments, is proved by a series of unquestionable authorities; and we are now to inquire, whether by the acts done since the adoption of the constitution—acts of the judiciary and legislature—these laws, with some modification, have not been affirmed and declared in such a manner as to bring them within the provision of the constitution, and make them absolutely binding, until repealed by the legislature.

A trial occurred soon after the adoption of the constitution, in 1791, against Edmund Freeman, a printer in Boston, on an indictment for a libel upon Mr. John Gardiner, then a barrister at law, a justice of the peace, and a member of the house of representatives. It was before there were any regular reports of judicial proceedings; but, being a cause which excited much interest, it was reported for the newspapers and magazines, from which a pretty satisfactory account of it can be obtained. A good abstract of it may be found in Judge Thacher's able judgment already cited. This case, in its various aspects, throws much light on the subject of inquiry. The prosecution by indictment was instituted and conducted by Sullivan, attorney general, who had studied and practiced the law before the revolution, was a member of the convention that framed the constitution, and was appointed a judge of the supreme judicial court, at its first organization. The trial took place before a full court, composed of Sargeant, chief justice, and Paine, Dana, Sumner and Cushing, justices. The first two must have entered on the study and practice of the law not much later than the middle of the last century, and the others but a few years later, and were men of mature years, and practisers

of long experience in the law, under the provincial government. Three of these judges had been members of the convention. Their construction, therefore, of this provision, had the force and effect of a contemporaneous exposition. They were eminently within the description of Blackstone, already cited, of judges whose knowledge of that law—the unwritten or customary law—is derived from experience and study, and from being “long personally accustomed to the judicial decisions of their predecessors,” and of course qualified to expound and declare the common law. The defence was conducted by Mr. Amory and Mr. Otis, eminent for their learning and talents as lawyers. It is not necessary to state minutely the particulars of this trial. It is sufficient that all the judges regarded the English common law of libel as in force here, and cited freely Blackstone, Hawkins, Cowper’s Reports, and other ante-revolutionary writers and cases, as the true and authoritative expounders of the existing law of Massachusetts. Nor was the law contested by the learned counsel for the accused, in their vigorous defence; but they also cited and commented upon similar English authorities.

But we have already suggested that in sanctioning the principles of the common law of libel, as a criminal offence, the court did it with some qualification. Dana, J., in his address to the jury, mentioned that it had been objected to the doctrine of libel, that the truth of the charges cannot be given in evidence, because it is no justification, if it is true. He says this is undoubtedly the rule of law, as established by the courts of Great Britain, yet perhaps the courts here may lay down a different principle; but this must depend upon the construction which they will give to the sixteenth article in the bill of rights, relative to the liberty of the press, and which declares that it “ought not to be restrained in this Commonwealth.” But he expressly reserves his opinion upon that subject, because it did not arise in that case, there being no offer to prove the truth of the charges, in defence. This reserve was manifestly founded in this consideration, viz., that the clause of the bill of rights might be so construed as to sanction the publication of every thing true, however much it might tend to provoke quarrels and breaches of the peace. Should it be so construed, then it would, to that extent, modify and abrogate the common law, which, it was conceded, prohibited giving the truth in evidence, in defence. It would then be brought within

the excepting clause of that other article of the constitution, declaring that all laws heretofore adopted, used and approved, and usually practiced on, shall remain in force, such *parts only excepted* as are repugnant to the rights and liberties contained in the same constitution. In the case supposed, that part of the English common law of libel, which, on a criminal prosecution for that offence, prohibits the giving of the truth in evidence, will be abrogated, because repugnant to the constitution relative to the liberty of the press. But the conclusion would be, that the residue of the common law of libel would remain in force.

Afterwards, and after the constitution had been a subject of further judicial consideration, this exception, founded on the clause declaring the liberty of the press, to some extent, though not to the extent intimated by Mr. Justice Dana, was judicially declared, in the case of *Commonwealth v. Clap*, 4 Mass. 163. This case was decided by a court composed of Parsons, Sedgwick, Sewall, Thatcher and Parker, every member of the bench being changed since 1791. In this case it was held, that when a man shall consent to be a candidate for a public office, conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office, and that publications *of the truth* on this subject, with the honest intention of informing the people, are not libels. And every man holding a public office may be considered as within the principle. But the publication of a libel maliciously, and with intent to defame, is clearly an offence against law.

This case of *Commonwealth v. Freeman*, affirmed by the later case cited, is a striking illustration of the maxim, that the exception proves the rule. If there were no law making libel a criminal offence, there would be no question of defence. The adjudication, that a particular clause of the criminal law of libel is excepted by the clause in the constitution, proves conclusively that the general law, subject to such exception, was adopted and affirmed by it.

These decisions have been followed by a long course of prosecutions for libel, as a criminal offence, extending through more than half a century, in which the existence of this rule of common law has never before been doubted by any judge called, in the course of official duty, to act on the subject.

We have suggested that there is another and distinct species of



evidence, arising after the constitution, showing that the common law, making libels criminal, and punishing them by indictment, was adopted and continued in force. We alluded to the acts and declarations of the legislature. An act regulating the mode of prosecution and defence, in criminal proceedings for libel, is as clear an admission and declaration of the existence of the law on which such prosecutions are founded, as can possibly arise upon implication. By the Rev. Sts. c. 82, § 28, and c. 86, §10, an appeal to this court is allowed to any person convicted in the court of common pleas or municipal court, upon indictment for a libel. This law, it is true, was afterwards repealed by St. 1839, c. 161; but that does not impair the force of the implication. That implication is just as strong, by providing that on such criminal prosecution there shall be no appeal.

But a more striking declaration, of the same sort, is found in Rev. Sts. c. 133, § 6, following, nearly in terms, the St. of 1826, c. 107, § 1. The provisions are, that "in every prosecution for writing or for publishing a libel, the defendant may give in evidence, in his defence, upon the trial, the truth of the matter contained in the publication charged as libellous; provided, that such evidence shall not be deemed a sufficient justification, unless it shall be further made to appear on the trial, that the matter charged to be libellous was published with good motives and for justifiable ends."

These provisions, recognizing the existence of the law of libel, and directing the mode of prosecution and defence, are as distinct a declaration and affirmance of that law, on the part of two distinct legislatures, at an interval of ten years from each other, as a statute expressly reciting the adoption and existence of this law. A declaration like this, on the part of the legislature, embracing, as it must, the authority of the governor, as well as the senate and house of representatives, not made to serve a turn, but in the ordinary course of legislation, is entitled to great weight, as evidence of the preëxisting common law.

In *Commonwealth v. Clap*, 4 Mass. 167, it was stated by the attorney general, Bidwell, that it was the constant practice of the court, in their charges to the grand juries, to mention libels as a proper subject for their inquiry; and as there was no statute animadverting on this species of offence, he drew the natural conclusion, that it must be in virtue of the common law, that they

were so charged. The fact, that it was the practice, so long as grand juries attended the supreme judicial court, so to charge them, is probably still within the recollection of many of the older practitioners.

These declarations of the legislature, and the contemporary exposition of the constitution by the older judges, immediately after its adoption, together with an uninterrupted course of judicial practice to the present time, form a body of proof that the common law, making the publication of a malicious libel a criminal offence, has been adopted in this Commonwealth, entirely conclusive and irrefragable; and he must be a bold judge, who should venture to decide that there is not now, and never has been, any such law, and that all the judgments which have been pronounced by the courts of this State, on convictions for this offence, have been erroneous.

*Exceptions overruled.*

## CHAPTER X.

### OFFENSES AGAINST THE HABITATION.

#### ARSON.

##### *The Burning.*

*Woolsey v. State, 30 Tex. App. 346. (1891.)*

APPEAL from the District Court of Johnson. Tried below before Hon. J. M. Hall.

This appeal is from a conviction of arson, the punishment assessed being five years in the penitentiary. The opinion sufficiently states the facts.

WHITE, Presiding Judge:

Appellant was tried and convicted in the court below on an indictment containing three counts charging him with arson. These counts differed only in the allegations as to the owner of the house burned. In the third count the allegation was: "Did then and there unlawfully and willfully set fire to and burn the house of J. R. Truelove, there situate, which said house was then and there occupied by the said H. P. Woolsey and M. E. Hawkins as tenants." In his charge submitting the case to the jury the learned trial judge confined them to the above count as quoted, and the conviction was had upon this count.

It is insisted by appellant's counsel, in a very able and earnest brief, that the evidence does not support the conviction under this count, because all the proof shows that the house belonged to Truelove; that Truelove rented it alone to Woolsey, this defendant; that M. E. Hawkins was not a party to the renting by Truelove to Woolsey, and consequently was not a tenant of Truelove. It is insisted that the word "tenants," being descriptive of the identity of the offense, must be proved as alleged, even though it might be unnecessary that the pleader should have so used it. This proposition is perhaps correct. *Rogers v. The State*, 26 Texas Ct. App. 404. Had there been no such allegation descriptive of the offense, the rule would have been that this court would not

inquire into the tenure or ownership of the occupier or the person in possession of the house, if in fact it was the dwelling of such person. *Tuller v. The State*, 8 Texas Ct. App. 501. The question then is, Does the proof fail to support the allegation? The common acceptation of the word "tenant" means: "One who holds or possesses lands by any kind of right; one who has an occupation or temporary possession of lands or tenements, whose title is in another; one who has possession of any place; a dweller; an occupant." Web. Dic. And this is substantially the legal definition. Bouv. Dic., "Tenant."

It will be observed that the allegation in the third count of the indictment is that the house was occupied by Woolsey and Hawkins as tenants. It is not alleged that Hawkins was a tenant of Truelove, the alleged owner of the house, and it is true that she did not unite in and was not a party to the original agreement between Truelove and Woolsey for the renting of the house. The proof, however, does show that she occupied the house under an agreement with Woolsey, and was in fact a tenant of Woolsey. She is therefore shown by the proof to have been a tenant and occupier of the house at the time of the alleged offense, and it was not necessary, under the allegation, to show that she was a joint tenant with Woolsey in renting from Truelove.

Again, it is insisted that the evidence is insufficient to establish arson—that is, arson under our statute. Three of the witnesses for the State testified that the wall of the house was scorched and smoked, but that they could not say that the wall or ceiling had caught fire. They also say that the floor was burned or charred in one place—a burnt place on the floor, where the fire burned partly through the floor. Two other witnesses testified that the wall of the house was scorched or smoked, but was not burnt, and did not catch on fire. They say that coal oil had been poured on the bed, and had been set on fire, and that it was burning up by the wall to the ceiling, but that they did not put out any fire in the house, but simply carried out the bed and bed-clothing into the yard, and extinguished the fire, which was confined to the bed-clothing, which was almost entirely destroyed. Under our statute with regard to arson, it is declared that the burning necessary to constitute the offense is complete when the fire has actually communicated to the house, though it may be neither destroyed nor seriously injured (Penal Code, art. 653), and the court so instructed the jury in its

general charge. The court refused to give the defendant's special instruction number 2, to the effect that "if they found that the house was simply scorched or smoked, then this would not be sufficient, and they should acquit the defendant." If the house was simply scorched or smoked, and the fire was not communicated to the building, then the offense was not complete under our statute. If the fire had burnt a hole in the floor, as testified to by some of the witnesses, then the offense was complete. The conflict as to whether the fire had actually communicated to the house was one which arose on the testimony of the State's witnesses.

Whether or not the fire was communicated to the house was an essential fact to be determined by the jury under appropriate instructions from the court. To constitute arson at common law it must be proved that there was an actual burning of the house, or some part of it, though it is not necessary that any part of it should be wholly consumed, or that the fire should have any continuance.

1 Am. and Eng. Encyc. of Law, p. 760, and note 1. So, on a charge of arson, it appeared that a small faggot was set on fire on the board floor of a room and the faggot was entirely consumed; but the boards of the floor were scorched black, but not burned, and no part of the wood of the floor was consumed. Creswell, J., said: "*Regina v. Parker*, 9 Carrington & Payne, 45, is the nearest case to the present, but I think it is distinguishable. \* \* \* I have conferred with my Brother Patteson, and he concurs with me in thinking that as the wood of the floor was scorched, but no part of it consumed, the present indictment can not be supported. We think that it is not essential to this offense that the wood should be in a blaze, because some species of wood will burn and entirely consume without blazing at all." *Regina v. Russell*, Car. & M. 541. The crime of arson is consummated by the burning of any, the smallest, part of the house; and it is burned, within the common law definition of the offense, when it is charred; that is, when the wood is reduced to coal, and its identity changed, but not when merely scorched or discolored by heat. *The State v. Hall*, 93 N. C. 571; *The People v. Haggerty*, 46 Cal. 355. We are of opinion that the court erred in refusing the special requested instruction.

Again, we are of opinion that the evidence, which was purely circumstantial, does not establish the guilt of the defendant with that conclusive probative force which would warrant us in per-

mitting the verdict and judgment to stand as a precedent; and on account of the insufficiency of the evidence, we are further of the opinion the court erred in not granting defendant a new trial.

For the errors pointed out the judgment is reversed and the cause remanded. *Reversed and remanded.*

Judges all present and concurring.

### *Character of Premises.*

*State v. McGowan, 20 Conn. 245. (1850.)*

This was an information for setting fire to and burning a dwelling-house. The prisoner pleaded *Not guilty*; on which issue the cause was tried, at Hartford, January term, 1850.

On the trial, it appeared, that the building burned was built by Norman Warner, and designed for a dwelling-house; was constructed in the usual manner of a dwelling-house, in all particulars; and was finished, except that it was not painted, as it was intended to be, and the glass was not set in the sash which had been placed in the upper half of one of the outer doors. The building stood by itself, and was not appurtenant to any other building; but it had not been occupied.

Upon these facts the prisoner's counsel claimed, and asked the court to instruct the jury, that the prisoner could not be convicted. The court did not so instruct the jury; but left the question whether the building was a dwelling-house, for their determination, as a matter of fact.

The jury found the prisoner *guilty*; and he thereupon moved for a new trial.

### CHURCH, CH. J.:

The statute of this state prescribes the punishment of arson, but it does not define the crime. We look to the common law for its definition.

Arson, by the common law, is the wilful and malicious burning of the house of another. The word *house*, as here understood, includes not merely the dwelling-house, but all outhouses which are parcel thereof. 1 Hale, 570. 4 Bla. Com. 221. 2 Russ. on Crimes, 551.

This information charges the accused with burning a dwelling-house, and the question in the case, is, whether the building, which was in fact burned by him, was a dwelling-house, within the meaning of the common law on this subject? That it was a dwelling-house, as distinguished from a building of any other kind, is certain.

The building is described to be one built and designed for a dwelling-house constructed in the usual manner. It was designed to be painted, but was not yet finished, in that respect, and not quite all the glass were set in one of the outer doors. The building had never been occupied, and it was not parcel nor an appurtenant of any other.

We think this was not a dwelling-house in such a sense, as that, to burn it, constituted the crime of arson. In shape and purpose, it was a dwelling-house, but not in fact, because it had never been dwelt in—it had never been used, and was not contemplated *as then ready* for the habitation of man.

Arson, as understood at the common law, was a most aggravated felony, and of greater enormity than any other unlawful burning, because it manifested in the perpetrator, a greater recklessness and contempt of human life, than the burning of any other building, and in which no human being was presumed to be. Such seems to be the spirit of the English cases on this subject, and especially the late case of *Elsmore v. The Hundred of St. Briavells*, 8 B. & C. 461. (15 E. C. L. 266.) 2 Russ. on Crimes, 556. In that case, Bayley, J., in speaking of the building therein described, says, "It appeared to have been built for the purpose of being used as a dwelling-house, but it was in an unfinished state, and never was inhabited. There cannot be a doubt, that the building in this case, was not a house in respect of which burglary or arson could be committed. It was a house intended for residence, though it was not inhabited. It was not therefore a dwelling-house, though it was intended to be one."

A dwelling-house once inhabited, as such, and from which the occupant is but temporarily absent, would not fall within the foregoing principle.

It may not be necessary to determine another question, made in this case—whether it appertained to the court or the jury to determine the character of the building? But we think it was the duty of the court to have instructed the jury as to the law of

the matter, and leave it to them to say from the proof, whether the building was a house, within the meaning of the law thus explained.

The considerations we have now expressed, induce us to grant a new trial of this cause.

In this opinion the other judges concurred.

New trial to be granted.

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*Ownership.*

*Snyder v. People, 26 Mich. 106. (1872.)*

COOLEY, J.:

The plaintiff in error was informed against for arson, which is charged to consist in the felonious burning, in the night time, of the dwelling-house of Mary A. Snyder. On the trial it appeared that Mary A. Snyder was his wife, and defendant (below) insisted that he could not be guilty of arson in burning her house. He also claimed to be the owner of the house, in fact, and this claim was submitted to the jury, who found against him. The prosecution, on the other hand, gave some evidence tending to show that defendant had separated himself from his wife, and given up his residence in the state. This evidence, however, did not become important on the trial, as the court instructed the jury that a husband might be convicted of arson in burning his wife's dwelling-house, though residing with her, and defendant was convicted accordingly.

The statute provides that, "Every person who shall willfully and maliciously burn in the night time, the dwelling-house of another," etc., shall be punished, etc.: Comp. L., § 5745. There are numerous decisions as to what is meant by the *dwelling-house of another*, as well at the common law as under like statutes to our own. Arson is an offense against the habitation, and regards the possession rather than the property: *State v. Toole*, 29 Conn. 344. The house, therefore, must not be described as the house of the owner of the fee, if in fact at the time another has the actual occupancy, but it must be described as the dwelling-house of him whose dwelling it then is: 2 East P. C. 1034; 4 Bl. Com. 220; Whart. Cr. L., § 1638; 2 Bish. Cr. L. 2d ed., § 24; Holmes' Case,



Cro. Cas. 376; Spaulding's Case, 1 Leach, 217; *Commonwealth v. Wade*, 17 Pick. 395. Even, it seems, though the occupation be wrongful: *Rex v. Wallis*, 1 Mood. C. C. 344; *State v. Toole*, 29 Conn. 344. It follows that a lessee could not be guilty of the felony in burning the premises occupied by him as such: 2 East P. C. 1029; 2 Russ. on Cr. 550; *McNeal v. Woods*, 3 Blackf. 485; *State v. Lyon*, 12 Conn. 487; *State v. Fish*, 3 Dutch. 323; *State v. Sandy*, 3 Ired. 570; 3 Greenl. Ev., § 55, while the landlord, during such occupation, might be: 2 East P. C. 1023-4; *Sullivan v. State*, 5 Stew. & Port. 175. A jail, it has been held, may be described as the dwelling-house of the jailer living with his family in one part of it: *People v. Van Blaricum*, 2 Johns. 105; *Stevens v. Commonwealth*, 2 Leigh, 683. And it seems that the wife, because of the legal identity with the husband, cannot be guilty of the offense in burning the husband's dwelling, even though at the time living separate from him: *March's Case*, Mood. C. C. 182. This would doubtless be so held whenever the wife's domicile is regarded in law as identical with the husband's, which for many purposes is no longer the case when they live separate.

It must be evident from this summary of the law on this subject, that if the husband, living with his wife, has a rightful possession jointly with her of the dwelling-house which she owns and they both occupy, he cannot, by common-law rules, be guilty of arson in burning it. It remains to be seen whether the statutes have introduced any changes which would affect the case.

The statutes upon which the question arises, are those for the protection of the rights of married women. But it is to be observed, that those do not in terms go beyond the ensuring to the wife such property as she may own at the marriage, and acquire afterwards, and the giving to her the power to protect, control and dispose of the same in her own name, and free from the interposition of the husband. None of them purports to operate upon the family relations; none of them takes from the husband his marital rights, except as they pertain to property, and none of them relieves him from responsibilities, except as they relate to the wife's contracts and debts. He is still under the common-law obligation to support the wife, and the services of the wife, which at the common law were regarded as the consideration for this support, are still supposed to be performed in his behalf and in his interest, except where they are given to her individual estate, or

separate business. The wife has a right to receive her support at the husband's domicile, unless she has lost it by misbehavior, and husband and wife together have a joint interest in and control of the children, which they cannot of right sever, and which are not, even in contemplation of law, regarded as distinct, though the courts are sometimes compelled to treat them as if they were so, when difficulties arise which make legal intervention essential to the protection and welfare of the children. As regards her individual property, the law has done little more than to give legal rights and remedies to the wife, where before, by settlement or contract, she might have established corresponding equitable rights and remedies, and the unity of man and woman in the marriage relation, is no more broken up by giving her a statutory ownership and control of property, than it would have been before the statute, by such family settlement as should give her the like ownership and control. At the common law, the power of independent action and judgment was in the husband alone; now it is in her also, for many purposes; but the authority in her, to own and convey property, and to sue and be sued, is no more inconsistent with the marital unity, than the corresponding authority in him. She is still presumptively his agent to provide for the household, and he is not deprived of the rights, or relieved of the obligations of head of the household, except as by their dealings an intent to that effect is indicated.

So far from an intent having been manifested on the part of the legislature to regard the family as simply a voluntary association of two persons, legally independent of each other, with their progeny, several of the changes have been in the direction of a unification of interests. Thus, the husband is deprived of all authority to sell, mortgage or otherwise charge the homestead without the wife's consent, though his title thereto may be complete and absolute: Const., Art. XVI., §§ 2, 3; *Dye v. Mann*, 10 Mich., 291; *McKee v. Wilcox*, 11 Mich., 358; *Ring v. Burt*, 17 Mich., 465. He is also precluded from selling or encumbering such personal chattels as are exempt by law from execution, unless with her assent (Comp. L., § 4465); and if he shall attempt to do so, she may bring action to recover the same in her own name: Comp. L., § 3294. These powers and privileges in respect to the husband's property are not conferred on the wife for her own benefit exclusively, or in order to give her interests independent of the husband;

but they are given her for the benefit of the whole family, in order that they may not be deprived of the reasonable means of support which the law has endeavored to save to them, and to the end that they may be kept together as a family, if such shall be their desire. And after the death of the husband and father, the family unity is still regarded in the protection which is given to the homestead: Const., *ubi supra*.

We have said that the wife is entitled to support at the husband's domicil, and, as we have seen, she may prevent his disposing of it. The statute has not given him a corresponding right to impede or preclude conveyances or encumbrances by the wife, but nevertheless, so long as they occupy together, he is not to be considered as being upon the premises by sufferance merely. He is there by right, as one of the legal unity known to the law as a family; as having important duties to perform, and responsibilities to bear in that relation, which can only be properly and with amplitude performed and borne while the legal unity represents an actuality; as having rights in consort and offspring which can only be valuable reciprocally while the one spot, however owned, shall be the home of all; and in many ways he still represents the family in important relations of society and government. Some of the legislation on the subject is exceedingly crude; some of it has injudiciously given powers to the wife in the disposition of property which it has prudently denied to the husband; but none of it makes the husband a stranger in law in the wife's domicil. The property is hers alone, but the residence is equally his; the estate is in her, but the dwelling-house, the *domus*, is that of both.

If, therefore, the husband shall be guilty of the great wrong to his wife and family, of setting fire to the house they inhabit, he is no more guilty of arson in so doing than the wife was at the common law for a like wrong to the dwelling-house of the husband. The case is a very proper one for a penal statute, but none has yet been enacted to meet it. The house, in legal contemplation, as regards the offense under consideration, is the dwelling-house of the husband himself.

But, in so holding, we do not decide that if the family relation is broken up in fact, and husband and wife are living apart from each other, whether, under articles of separation or not, the same exemption from criminal liability can exist. There is much reason for holding that the wife's dwelling-house can be considered

that of the husband, only while he makes it such in fact, and that there is no such legal identity as can preclude her house being considered, in legal *proceedings* against him, as the dwelling of "another," when it is no longer his abode. That case was not fairly presented upon this record, and was barely alluded to on the argument; and it must be left for proper consideration when it becomes necessary to decide it. We confine our attention now to the case of a husband in the practical exercise of the right to reside with his family in the wife's dwelling-house, which the wife, at the same time, practically concedes. In such a case, the dwelling-house cannot be said not to be that of the husband.

It follows that the judgment was erroneous, and it must be reversed, and a new trial ordered.

The other justices concurred.

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*The Intent.*

*Luke v. State, 49 Ala. 30. (1873.)*

B. F. SAFFOLD, J.:

The appeal is from a conviction of arson, in setting fire to or burning the jail of Wilcox County. The appellant was confined in jail under a charge of assault with intent to murder, together with Nettles, who was under indictment for rape. The two attempted in concert to break prison, by burning a hole through the floor of their apartment. They had burned the floor about six inches deep, but not entirely through, when they were detected by the jailer and others, who extinguished the fire. While committing the burning, they controlled the fire with water saved from their allowance. The questions involved in the charges given and refused are: Whether the burning for the purpose of escape, and without the intention of consuming the building, would constitute arson; and whether, both being prisoners, and each endeavoring to escape, they can be said to have assisted each other to escape, which is made a felony by R. C. § 3573.

The indictment was maintained under R. C. § 3698, which declares that "any person who wilfully sets fire to, or burns, any church, meeting-house, court-house, town-house, college, academy, jail, or other building erected for public use," is guilty of arson

in the second degree. The setting fire to, or burning, was sufficiently done. Any destruction of the material of the house, no matter how slight, is a burning within the prohibition. *Graham v. The State*, 40 Ala. 659. Was it done *wilfully*? This term means less than maliciously, and more than intentionally or designedly. It means unlawfully, and to some extent wickedly. A setting fire to a house for any unlawful purpose cannot be innocent, though the purpose is not accomplished. If a person from the outside should set fire to a house, with the intention of burning a hole through which he might enter and steal, he would not be guilty of burglary, unless he succeeded in making the hole and entering. Unless he would be guilty of arson, this dangerous crime could scarcely ever be proved, because the perpetrator would truly have some other purpose to be accomplished by the burning.

Breaking jail, by the common law, is a felony, or a misdemeanor, according as the cause of the imprisonment belongs to the one grade or the other. 2 Bish. Crim. Law, § 1031. We have no statute declaring and punishing the offence of breaking jail by one charged with felony, but not convicted. As a misdemeanor, which it includes, it is punishable under R. C. § 3754, recognizing and providing the punishment of all misdemeanors at common law not enumerated in the Penal Code. Imprisonment for crime gives no immunity to the prisoner to commit crime. He remains subject to all of the restraints imposed on other persons. The least privilege of escape conceded to a prisoner would carry with it the right to use any means he could command. It is a misdemeanor if, without any obstruction, he merely walk away. 2 Bish. Crim. Law, § 1063. The causeless setting fire to a house, by a person of responsible mind, is arson, because the necessary intention is presumed from the act. The same act, done with the intention of committing a crime, whether felony or misdemeanor, must also be held to be arson, because the very recklessness of the deed supplies the wilful intention.

2. The case is aggravated, so far as the intention is concerned, if the defendant and Nettles can be said to have assisted each other, for then they were in the commission of a felony. R. C. § 3573. Is it possible to separate the idea of assistance from the single design of each to effect his escape? If so, any combination of prisoners to effect their escape, no matter how formidable, or how destructive in its results, is no more criminal than the single

effort of one who could, perhaps, have accomplished no mischief.

In *The People v. Rose* (12 Johns. R. 339), the defendant attempted to escape by breaking the prison, in consequence of which a fellow-prisoner, confined for felony, was enabled to escape. The court said the case was clearly within the mischief which the statute was made to prevent. The indictment was for aiding a prisoner confined for felony to escape.

The two authorities cited by the appellant, *State v. Mitchell* (5 Iredell, 350), and *People v. Catteral* (18 Johns. 115), assert the doctrine, that if a prisoner in a jail set fire to it with the design of merely breaking a hole through to effect his escape, and not of burning it down for that purpose, it is not arson. Bishop dissents from such a proposition, holding it not necessary that the intent should be to commit a felony. 2 Bish. Crim. Law, § 41.

All of the authorities agree, that where the firing is done with the intention of committing any felony, it is arson. Our Penal Code very properly omits to graduate the offence of breaking jail by the character of the offence for which the accused is imprisoned, because the mischief is the same no matter by whom committed. The guilt or innocence of this defendant is not dependent upon whether he was in the commission of a different felony or not. He intentionally and designedly set fire to the jail, in order to accomplish an unlawful purpose, and consequently the burning was wilfully done. It would not be safe to graduate his offence by the extent of the burning he intended to do, because, as far as intention constitutes the crime, the criminality is the same whether the house is burned slightly or consumed. The lives and property of other persons cannot be made dependent upon his supposition of how much burning he can do without consuming the house.

3. The court administered to the jury the proper oath. R. C. § 4092.

4. The indictments introduced were the best evidence of the causes for which the accused were imprisoned. They were also relevant in proof of the corrupt intention with which the burning was done.

The judgment is affirmed.

## BURGLARY.

*The Breaking.*

*State v. Boon, 13 Ired. (N. C.) 244. (1852.)*

Appeal from the Superior Court of Law of Sampson County, at the Spring Term 1852, his Honor Judge ELLIS presiding.

The prisoner was indicted for a burglarious entry into the dwelling house of one John Owen, in the county of Sampson. The indictment contained two counts. In the one, it was alleged, that the intent was to commit a rape upon Sarah Ann, the daughter of said Owen; and in the other, to commit a rape upon Sarah Eliza Owen, the grand-daughter of said Owen.

Sarah Ann swore, that she retired early to bed in a shed room of the dwelling house of her father, in company with her niece, Sarah Eliza, on the night of the 21st of December, 1851. The girls slept in the same bed. Previous to retiring they examined the room, and were satisfied no one else was there. Shortly after getting to sleep, she was awakened by feeling some one touch her foot, and saw some person in a stooping position by the bed side. The person grasped her ancle, when she screamed, and recognised the prisoner retreating and escaping by the window. She was well acquainted with him. He had married a servant of her father's, who lived on the premises; but she had not seen him for some days. There had been fire in the room, and the embers on the hearth gave sufficient light to enable her to distinguish an individual. She had locked the door. The window was down when she went to bed, but the fastenings were not on. It was usual to fasten it down with a nail, which would prevent any one from without from raising it. When she arose the window was up, and was held by a stick. It was not the usual sleeping apartment of the witness. She had not slept there for six months previous. It was usually occupied by one Mrs. Faircloth.

Sarah Eliza Owen testified in all respects as her aunt, except that she was not well acquainted with the prisoner, although she had seen him often. She was not positive, but said she *took* the person to be the prisoner.

John Owen swore, that he was awakened on the night in ques-

tion, about ten o'clock, by the screams of his daughter, and, upon going to her room, received substantially the account of the affair, as testified to above. He took a light and searched the premises; but could not find the prisoner nor any one else. He did not go to the prisoner's wife's house to see who was there—all was dark and silent. He did not afterwards see the prisoner until he was arrested.

His Honor charged the jury, that they must be satisfied, that it was the prisoner, who entered the dwelling house of Owen, and that he entered with an intent to commit a rape upon the person of Sarah Ann Owen, or of Sarah Eliza Owen; and that, if they were satisfied of one or both of these allegations, they should find the prisoner guilty. The prisoner's counsel prayed the Court to charge the jury, that there was no evidence of either intent, as charged in the bill of indictment; that if the window was usually fastened by a nail or otherwise, and that upon the night in question such fastening was omitted, although the window might have been down, the entry would not have been burglarious, and the prisoner would be entitled to their verdict.

His Honor refused so to charge. There was a verdict of guilty, and a rule for a new trial was had and discharged; and, judgment having been pronounced, an appeal was prayed and allowed.

#### PEARSON, J.:

The exception, in reference to the breaking, is settled against the prisoner by the authorities. Passing an imaginary line is a "breaking of the close," and will sustain an action of Trespass *quare clausum fregit*. In Burglary more is required—there must be a breaking, removing, or putting aside of something material, which constitutes a part of the dwelling house, and is relied on as a security against intrusion. Leaving a door or window open shows such negligence and want of proper care, as to forfeit all claim to the peculiar protection extended to dwelling houses. But, if the door or window be shut, it is not necessary to resort to locks, bolts, or nails; because, a latch to the door, and the weight of the window, may well be relied on as a sufficient security. Chimnies are usually left open, yet, if an entry is effected by coming down a chimney, the breaking is burglarious.

The motion in arrest of judgment, based on the distinction between felonies at common law and those created by statute, cannot



be sustained. There seems to have been a doubt upon the question at one time, but the later authorities do not leave it open to discussion.

The exception, in reference to the want of evidence of the felonious intent, presents the only question, as to which we have had any difficulty. The evidence of the intent charged is certainly very slight, but we cannot say there is no evidence tending to prove it. The fact of the breaking and entering was strong evidence of some bad intent—going to the bed and touching the foot of one of the young ladies, tended to indicate, that the intent was to gratify lust. Taking hold of—“*grasping*,” (as the case expresses it) the ankle, after the foot was drawn up, and the hasty retreat without any attempt at explanation, as soon as the lady screamed, was some evidence, that the purpose of the prisoner, at the time he entered, was to gratify his lust by force. It was, therefore, no error to submit the question to the jury. Whether the evidence was sufficient to justify a verdict of guilty is a question, about which the Court is not at liberty to express an opinion.

PER CURIAM.

Judgment affirmed.

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*Entry.*

*State v. McCall, 4 Ala. 643. (1843.)*

The defendant was indicted for burglary, at a term of the Circuit Court of Mobile, commencing on the sixth Monday after the fourth Monday in September, 1842.

The cause was tried on the plea of *not guilty*, and certain questions of law reserved, which are referred to this Court as novel and difficult. These questions are thus stated, “In this case it was proved by the State, that the supposed burglary was committed by the defendant, in the mansion house of Mrs. Ann Vincent, in the city of Mobile. That between eleven and twelve o’clock at night, Mrs. Vincent had retired, and heard a noise at the window, indicating that force was being used to open the shutters, or blinds—that the window itself was fastened down, in such a manner that it could not be opened from without—that the shutters were also fastened in the ordinary way before Mrs. V. retired—that after hearing the noise without, alarm was given to a lodger in the house, who upon going out, found the defendant

in the yard, near the window, the shutters of which had been opened, and were then standing open. After the witnesses had been examined, and the arguments of counsel on both sides concluded, defendant's counsel asked the Court to allow defendant to make a statement to the jury—this the Court declined. The Court then charged the jury, that if they believed from the testimony, that the defendant, by the application of force, wrested open the window shutters, and his hands protruded beyond the line made by the shutters when shut, that that in law, was an entry, notwithstanding the sash remained down and the glass was unbroken."

The prisoner was found guilty, and sentenced to imprisonment in the Penitentiary for the space of ten years.

#### COLLIER, C. J.:

The crime of burglary may be defined to be, the breaking and entering a dwelling house in the night time, with intent to commit a felony. For the purposes of this offence, it is said the term "dwelling house," comprehends all buildings within the curtilage or inclosure, &c. (1 Hale's P. C. 358, 559; Hawk. P. C. Ch. 38, § 12; East's P. C. 492; *id.* 493, 501, 508.) The offence consists then in violating the common security of the dwelling house in the night time, for the purpose of committing a felony. (*Commonwealth v. Stephenson et al.*, 8 Pick. Rep. 354.) But what is a violation, is not in all cases entirely clear; the authorities discovering a great want of harmony. It is not our purpose now, to notice the many adjudications with which the books abound; but only to consider a few of those most pertinent to the case in hand, and then state the principle which must control our decision.

In *Rex v. Bailey* and another, (Russ. and R. C. C. 341,) it appeared that a sash window belonging to a dwelling house, was fastened in the usual way, by a latch, from the bottom of the upper sash to the top of the lower one; and that there were inside shutters, which were fastened. One of the prisoners broke a pane of glass in the upper sash of the window, and introduced his hand within, with the intention to undo the latch by which the window was fastened. While he was cutting a hole in the shutter with a centre bit, and before he had undone the latch of the window, he was seized. All the Judges were of opinion, that the introduction

of the hand between the window and the shutter to undo the window latch, was a sufficient entry to constitute a burglary.

In *Rex v. Rust and Ford* (1 Moody's C. C. 183), the facts were these: the glass sash window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the shutters themselves were about an inch thick. It appeared that after the sash was thrown up, a crow-bar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found on the inside of the shutters. The Judges were of opinion that this was not a case of burglary, as it did not appear whether any part of the hand was within the window, although the aperture was large enough to admit it.

Any, the least entry, is sufficient by means of the hand, or foot, or even by an instrument with which it is intended to commit a felony. (East's P. C. 490; Foster's C. L. 107; 1 Hawk. P. C. Ch. 38, § 7; 1 Hale's P. C. 555.) But the entry, it is said, must appear to have been made with the immediate intent to *commit a felony*, as distinguished from the previous intent to *procure admission* to the dwelling house. Where it appeared that a centre-bit had penetrated through the door, from chips found in the inside of the house, yet as the instrument had been introduced for the purpose of breaking, and not for the purpose of taking the property or committing any other felony, it was held the entry was incomplete. (1 Leach's C. L. 452; East's P. C. 491.)

The citations from the crown cases, it must be admitted, lend their support to the charge of the Circuit Judge to the jury. The only difference being, that there was a breach and entry of the sash, while here, the breach and entry was of the blinds, which were the outer protection. This, it is conceived, cannot require the application of a different principle. It cannot be, that the common security of the dwelling house is violated by breaking one of the shutters of a door or window which has several. True, it weakens the security which the mansion is supposed to afford, and renders the breach more easy; but as additional force will be necessary before an entry can be effected, there can, under such circumstances, be no burglary committed.

Suppose the shutter of a door made by placing plank upon each other until it is two or three double, if the thickness of one

of the plank be removed by one intending to commit a burglary, and an entry thus far made, can it be said that the offence was completed? What, in point of principle, is the difference between such a case, and one where there are several shutters, an inch or two apart from each other. In neither case can such an entry be made as will enable the aggressor to commit a felony. In such cases the entry may be said to be made with the intent rather to *procure admission into the dwelling house*, than to *commit a felony*, which we have seen is an indispensable constituent of the crime of burglary.

To constitute burglary, an entry must be made into the house with the hand, foot, or an instrument with which it is intended to commit a felony. In the present case there was nothing but a breach of the blinds, and no entry beyond the sash window. The threshold of the window had not been passed, so as to have enabled the defendant to consummate a felonious intention; and according to the principle we have laid down, the charge to the jury was erroneous.

The constitution guarantees to every one charged with the commission of a crime, the right to be heard by himself and counsel, but it does not permit the accused to make a statement of facts to the jury, unless it be authorized by the evidence adduced. Here the reasonable inference perhaps is, that the statement proposed to be made was not in the course of a legal defence; at any rate the leave of the Court was not asked for that purpose, until, according to the regular course of procedure, the arguments for the State and the prisoner had been concluded. Taking this to be true, the Court might very well have refused to allow the defendant to make the statement he desired.

For the error in the first question considered, the judgment is reversed, and the defendant is directed to remain in custody to await a trial *de novo*, unless in the *interim* he be discharged by due course of law.

*Character of Premises.**State v. Meerchouse, 34 Mo. 344. (1864.)*

BAY, Judge, delivered the opinion of the court.

At the May term, 1863, of the Osage Circuit Court, the defendant was indicted for burglary and larceny, and at the November term following tried and convicted. The usual motions for new trial and in arrest were made and overruled, and the case is brought here by writ of error. No objections have been urged to the instructions given on the part of the State. The defendant asked five instructions, and it is insisted by the Attorney General that all were given, while it is contended by defendant's counsel that his fifth instruction was refused. The difficulty grows out of the imperfect manner in which the record is made up. From all, however, that we can gather from the record, it appears that the instruction, as asked by defendant, was in the following words: "A dwelling-house is a house in which the occupier and his family usually reside at the time the burglary was charged to have been committed."

The court gave the instruction with the following words added: "That is, the building was a dwelling-house, and not an out-house."

During the argument of the case, and while defendant's counsel was addressing the jury, some altercation took place between the court and counsel as to the meaning and interpretation that should be given to the instruction, whereupon the court withdrew the instruction and gave the following in lieu of it:

"A dwelling-house is a house in which the occupier and his family usually reside, and in this case it is not necessary that any person should be actually in the house."

We see in this no ground for reversing the judgment. The instruction, as finally given, is subject to no legal objection, and substantially contains the principle embraced in the instruction, as asked by defendant.

It has, however, been very ingeniously argued, that the building alleged to have been broken open was not a dwelling-house, and, therefore, the offence is not burglary. The proof upon this

point shows that the premises belonged to one Frans Hutchmeyer. Hutchmeyer was a witness on the part of the State, and testified that he was the owner of a dwelling-house in Osage county; that he had lived in the house, but moved out of it some time in the spring of 1862, and went about four or five miles off to live with his brother, leaving a part of his furniture in the house; that he returned in three or four months; that at the time he left he locked the house up, and that during his absence no person had lived in it; that on his return to the house he discovered that it had been broken open and some things stolen.

As this indictment is for burglary in the second degree, it is not necessary to show that any person was in the house at the time of the breaking and entering; but it is necessary that the house should be a dwelling-house. In Roscoe's criminal evidence, (5th Am. Ed.,) p. 350, reference is made to many of the leading English cases, from which it appears that a temporary locking up of the house, or absence of the proprietor and his family, does not make it any the less a dwelling-house. The following cases are particularly cited:

If A, says Lord Hale, has a dwelling-house, and he and his family are absent a night or more, and in their absence a thief breaks and enters the house, to commit felony, this is burglary. (1 Hall, P. C. 556; 3 inst. 64.)

So if A have two mansion-houses, and is sometimes with his family in one and sometimes in the other, the breach of one of them, in the absence of his family, is burglary. (Id. 4 Rep. 40, a.)

So if A have a chamber in a college or inn of court, where he usually lodges in term time, and in his absence in vacation his chamber or study is broken open, this is burglary. (1 Hale, P. C. 556.)

Again, the prosecutor being possessed of a house in Westminster, in which he dwelt, took a journey into Cornwall, with intent to return, and move his wife and family out of town, leaving the key with a friend, to look after the house. After he had been absent a month, no person being in the house, it was broken open and robbed. He returned a month after with his family. This was adjudged burglary. (2 East, P. C. 496.)

In this country it has been held, that if A have a residence in the city and one in the country, residing with his family during

the summer in one, and in the winter in the other, the breach of either, during the absence of A and his family, (though no person may be sleeping in it,) for the purpose of committing a felony, is burglary.

It is equally well settled, that if the owner locks up his house and leaves it, with a settled purpose not to return, it ceases to be his dwelling-house, in the sense necessary to make an unlawful breaking a burglary. To continue it his mansion-house, he must have quitted it *animo revertendi*.

In the case at bar, we think it apparent that the owner of the premises had no intention to remain away permanently. He left most of his furniture in the house; made no effort to rent it or make any disposition of it whatever, and returned to it after an absence of three or four months at his brother's, who resided in the same county.

The other judges concurring, the judgment will be affirmed.

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*Night time.*

*State v. Bancroft, 10 N. H. 105. (1839.)*

Indictment for burglary, in breaking and entering the dwelling-house of one William Stickney, about the hour of twelve, in the night time of the ninth of November, A. D. 1837, with intent to steal, and stealing therefrom one butter firkin, and thirty pounds of butter.

The only direct evidence to show that the entry and taking of the property was in the night time, was the testimony of the wife of said William, that she saw the firkin of butter, in the back room, on the ninth of November, after dark; and that in the morning, when she got up, it was gone.

The defendant's counsel contended that there was not sufficient evidence that an entry was made in the night time; but the court submitted the evidence to the jury, with instructions that it was competent for them to consider; and that if they were satisfied, beyond a reasonable doubt, that the defendant entered after daylight was gone, and before daybreak the next morning, they might find an entry in the night time.

The jury having found the defendant guilty of entering in the

night time, without breaking, with intent to steal, his counsel moved for a new trial.

PARKER, C. J.:

The evidence in this case was sufficient to authorize the jury to find that the entry was made in the night. Such a fact may be shown by circumstantial evidence, like other facts; and the testimony that the butter was seen in the house after it was dark, and was missing the next morning when the witness got up, led very strongly to the conclusion that it was taken in the course of the night; although the precise hour when the witness called it dark, did not appear, and the time when she arose in the morning was not stated. At whatever time in the morning the loss was discovered, the jury might well weigh the probability whether the article would have been taken from the house in the day time, in connection with the other evidence. It was sufficient that, upon the whole case, they had no reasonable doubt that the act was done in the night time.

The direction as to what constituted the night time was correct. "It hath been anciently held, that after sunset, though daylight be not quite gone, or before sunrising, is *noctanter*, to make a burglary." 1 Hale's P. C. 550. "But it is now generally agreed, that if there be daylight enough begun or left, either by the light of the sun or twilight, whereby the countenance of a person may reasonably be discerned, it is no burglary: but that this does not extend to moonlight; for then many midnight burglaries would go unpunished." 2 East's P. C. 509; 1 Hale's P. C. 550. If the rule laid down in the charge to the jury was not precisely the same as that found in the authorities just cited, it was substantially the same, and quite as favorable for the prisoner. There is no intervening time between the night and the day; and when the light of the latter is entirely gone, and the great characteristic which distinguishes it from night no longer exists, the day terminates with it. The next day commences with the earliest dawn, and the night of course ends at that time. That the matter does not depend upon the degree of light, and the ability to distinguish objects at the time, is evident, because the light of the moon, however bright it may be, makes no difference.



## INTENT.

*State v. Cooper, 16 Vt. 551. (1844.)*

The opinion of the court was delivered by

WILLIAMS, Ch. J.:

The respondent was indicted for burglary, and was convicted on the second count,—which charges him, in substance, with breaking and entering a dwelling house in the night time, with intent to commit adultery.

Our statute makes it burglary for any one, in the night time, to break and enter any dwelling house, &c., with intent to commit the crime of “murder, rape, robbery, larceny, *or any other felony.*” Adultery was not a felony at common law, nor a crime to be punished in the common law courts. Neither does our statute make it felony. Nor does it come within any definition of felony, which can be found. Until the legislature think proper to declare the transaction, of which the respondent was found guilty, an offence, we cannot determine it so to be.

The judgment of the county court is reversed, and judgment arrested.

## CHAPTER XI.

### OFFENSES AGAINST PROPERTY.

#### LARCENY.

##### *Property That May Be Stolen*

*Haywood v. State, 41 Ark. 479. (1883.)*

ENGLISH, C. J.:

Horace Haywood was indicted in the circuit court of Sebastian county, Fort Smith district, for larceny. There were three counts in the indictment. The first count charged, in substance, that said Horace Haywood, on the twenty-ninth of April, 1883, at, etc., one reclaimed and tame mocking bird, of the value of twenty-five dollars, and one bird cage of the value of one dollar, of the property, goods and chattels of Ellen Lane, etc., did steal, take and carry away, etc.

The second count was for receiving the mocking bird and cage, knowing them to have been stolen.

The third count was for stealing the cage.

The court overruled a demurrer to the indictment interposed by defendant; he was tried by a jury on the plea of not guilty, found guilty on the first count of the indictment, sentenced to the penitentiary for one year, refused a new trial, took a bill of exceptions and prayed for an appeal, which was granted by one of the judges of this court.

On the trial it was proved that appellant, at some time during the night of the twenty-ninth of April, 1883, stole the mocking bird and cage from the front portico of Miss Ellen (Nellie) Lane, their owner, in Fort Smith, and sold them about one o'clock of the same night for \$4.25 to a gentleman at the Southern Hotel of that city, who was about to leave for Van Buren, and who had previously requested appellant to procure him a mocking bird, and he had promised to do so.

Missing her bird and cage next morning, the lady pursued the

gentleman to Van Buren, where she found them in his possession, and he surrendered them to her. He offered her twenty-five dollars for the bird, which she declined, saying no money could buy it. It was three years old and a very fine songster.

The gentleman who had purchased the bird of appellant, testified that it was a very fine songster, one of the finest he had ever heard. He had purchased mocking birds before, but never paid over three dollars for a bird. He did not know whether they were fine singers or not, as they died soon after he bought them.

C. H. Boyd, a druggist of Fort Smith, who had dealt in birds, testified that he had sold mocking birds at from five to ten dollars. Fine singers were quoted in the New York market at from fifteen to twenty-five dollars. He knew Miss Lane's bird; it was a fine singer and worth in the Fort Smith market from fifteen to twenty-five dollars. Mocking birds improve in singing qualities up to three years of age. Such as he had sold from five to ten dollars were only a year old. The cage was worth from one dollar to one dollar and a half. It cost about fifty cents a month to keep a mocking bird.

Another witness testified that he had known mocking birds sold in other markets at from ten to twenty-five dollars.

Defendant moved the court to instruct the jury:—

"1. That mocking birds in this State are not the subject of larceny, and the jury must return a verdict of not guilty as to taking of the bird.

"2. If the jury find that the bird was confined in the cage taken, the bird imparted its value to the cage, and a verdict of not guilty must be returned, both as to the bird and the cage."

These instructions the court refused and charged the jury as follows:—

"That mocking birds were such property as to be the subject of larceny in this State, and that in ascertaining the value of such birds, the criterion of valuation should be the value of fine singing mocking birds in this market."

Larceny, at common law, is defined to be "the felonious taking and carrying away of the personal goods of another."—*Blackstone*.

By the common law there can be no larceny of animals *ferae naturae*, or wild animals, unreclaimed. When reclaimed they become the subject of this offense, provided they are fit for food, not otherwise.

But the English courts made exceptions to the rule, that reclaimed animals, to be the subject of larceny, must be fit for food. Thus the tamed hawk was held to be the subject of larceny, though unfit for food, because it served to amuse the English gentlemen in their fowling sports. So reclaimed honey bees were made an exception, because, though not fit for food themselves, their honey is.

Under decisions of English and American courts, made upon the common law definition of larceny, Mr. Bishop classes the following animals, when reclaimed, as the subjects of the offense: Pigeons, doves, hares, conies, deer, swans, wild boars, cranes, pheasants, partridges and fish suitable for food, including oysters.

To which might be safely added wild turkeys, geese, ducks, etc., when reclaimed.

Of those animals of which there can be no larceny, though reclaimed, he puts down the following: Dogs, cats, bears, foxes, apes, monkeys, polecats, ferrets, squirrels, parrots, singing birds, martins and coons.

In the South, squirrels are in common use as food animals, and the hunters of all climates regard bears as good food.

Iowa is credited with the decision (*Warren v. State*, 1 Green 106) that coons are unfit for food, and therefore by the common law, not the subject of larceny, when reclaimed.

Among the colored people of the South the coon when fat in the fall and winter, is regarded as a luxury, and the Iowa decision would not be regarded by them as sound law or good taste.

On the whole subject, see 2 Bishop on Criminal Law (6th Ed.), secs. 757, 781 and notes.

Every species of personal property was not the subject of larceny at common law. For example, dogs were treated as personal property, and on the death of their owner, if not disposed of by will, went to his executor or administrator as such. So the owner of a dog could bring a civil action against one who injured or took the animal.

So choses in action, as bonds, bills, notes, etc., were classed as personal property, and subjects of the action of detinue, etc., but larceny could not be committed of them.

Under the technical rules of the ancient common law, says Mr. Bishop, prevailing still, except as expanded by statutes, larceny was restricted, as to the property of which it could be committed,

as well as in some other respects, within limits too narrow to meet the requirements of a more refined and commercial age. Consequently statutes in England and in the United States have greatly enlarged the common law doctrine.—*Ib.*, sec. 761.

The provisions of the larceny statute of this State are very broad and comprehensive. The first section defines the crime thus: "Larceny is the felonious stealing, taking and carrying, riding or driving away the personal property of another." This perhaps is not more comprehensive than the common law definition.

The second section declares that "larceny shall embrace every theft which unlawfully deprives another of his money or other personal property, or those means and muniments by which the right and title to property, real or personal, may be ascertained."

The third section makes any bank note, bond, bill, note, receipt, or any instrument of writing whatever, of value to the owner, the subject of larceny.

The fourth section declares that "the taking and removing away any goods or personal chattels of any kind whatever, with intent to steal the same, whether the articles stolen be in the immediate possession of the owner or not, unless it shall appear that the owner has abandoned his claim thereto, shall be deemed larceny."—*Gantt's Digest*, secs. 1352-7.

Under similar statutes of New York and Tennessee, it has been decided that dogs are the subject of larceny.—*Mullalley v. People*, 86 New York (Court of Appeals), 365; *State v. Brown*, 9 Baxter (Tenn.), 53. Though in the States where the common law has not been enlarged by statute, the rulings have been otherwise.

In *Mullally v. People*, it was well said by Justice Earle, who delivered the opinion of the court, that "in nearly every household in the land can be found chattels kept for the mere whim and pleasure of its owner; a source of solace after serious labor, exercising a refining and elevating influence; and yet they are as much under the protection of the law as chattels purely useful and absolutely essential."

The reclaimed mocking bird in question was no doubt personal property. The owner could have brought trespass against the thief, who invaded her portico at night, and deprived her of the possession of her songster, which she prized above price; and she could have maintained replevin against the person to whom he sold it, had he refused to surrender it to her.

The market value of the bird was, perhaps, more than ten times greater than that of the cage, which was the subject of petit larceny. To hold that larceny might be committed of the cage, but not of the bird, would be neither good law nor common sense.

Affirmed.

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*Holly v. State, 54 Ala. 238. (1875.)*

By the act of February 20th, 1875, the stealing of "any *part* of an outstanding crop of corn or cotton" was made grand larceny, without regard to the value of the part stolen. Under this act the defendant was indicted for "feloniously taking and carrying away fifteen ears of corn, a *portion* of an outstanding crop, the personal property of William Russell," &c., and upon a verdict of guilty, sentence was pronounced upon him. The rendition of sentence upon the verdict, is now assigned as error.

BRICKELL, C. J.:

The most approved definition of larceny, at common law, is that given by Mr. East, in his *Crown Laws*: "The fraudulent or wrongful taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner."—2 East, 524; 3 Green. Ev. § 150. An indispensable constituent of the offense thus defined, is, that the thing taken must be of goods personal, and not of chattels real, or such as are annexed to the freehold. Corn, grass, trees, and the like, adhering to the freehold, were not the subjects of larceny, but the severance of them (according to Blackstone) "was, and in many things is still, merely a trespass which depended on a subtlety in the legal notions of our ancestors. These things were parcels of the real estate, and, therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable." As to the time intervening between the severance and the asportation, which would make them separate acts, instead of one continuous act, nice distinctions were made. Sometimes it was held a day must intervene between the severance and the asportation, to make them separate acts, because the law does not recognize a fraction of a day. The better doctrine, however, is, as stated by Mr. Bishop, that no par-

ticular space of time is necessary, only the two acts must be so separated as not to constitute one transaction.—2 Bish. Cr. Law, § 679. When by one act the thing was severed from the freehold, and by another distinct act it was carried away with the criminal intent, though before severance it was part of the freehold, it was the subject of larceny. This rule of the common law has been modified from time to time in England, by acts of parliament, so as to afford protection to things fixed to the freehold, as they became the objects of criminal severance and asportation, and were from their nature exposed to it. The rule was never satisfactory, and the courts in modern times, were inclined to confine it within the narrowest limits.—*Hoskins v. Torrence*, 5 Black. 417; *Jackson v. State*, 11 Ohio St. 104.

The statutes of this State do not define larceny; the stealing of certain things, or of any property other than that particularly enumerated beyond a certain value, is declared grand larceny. The stealing of property of any value from any building on fire, or which was removed in consequence of an alarm of fire; or, the stealing from designated places, of any personal property exceeding in value fifty dollars, is also declared grand larceny.—R. C. §§ 3706-7. The stealing of any other personal property, under other circumstances, is declared petit larceny.—R. C. § 3708. At the last session of the General Assembly, the statutes were amended so as to convert the stealing of “any part of an outstanding crop of corn or cotton,” into grand larceny, without regard to the value of the part taken. The frequency of such depredations on outstanding crops, rendered legislation for their protection necessary; as such legislation was rendered necessary in England, and in other States of the Union.

Under this amended statute, an indictment was preferred against the appellant, charging that he “feloniously took and carried away fifteen ears of corn, a portion of an outstanding crop, the property of William Russell,” &c. It is now urged the indictment is insufficient to support a conviction, because it does not aver the corn taken was not previously severed from the freehold—because there is no averment that it was the personal property of William Russell—because it is not averred the corn was part of an outstanding crop. The indictment pursuing the words of the statute describes the thing taken, as a *portion* of an outstanding crop. It varies from the exact words of the statute only

in substituting the word *portion* for *part*. We see no reason for the substitution of the one word for the other. It is the better practice to follow the exact words of the statute, though in the particular instance their equivalents may be sufficient. *Portion*, as here employed, is the equivalent of the statutory word *part*, and equally with it, describes the act in which the offense consists. A distinct averment that the corn was not, at the time of the felonious taking, severed from the freehold, was not necessary. The statute makes it larceny to steal a thing, not the subject of larceny at common law. The general rule is, that in an indictment under such a statute, the statutory term must be used, and is sufficient.—2 Bish. Cr. Pr. 731. The purpose of the statute was to convert the severance and asportation of a standing crop—a crop not severed from the freehold—into a criminal offense. Before the statute, under the common law, it was a mere trespass. The felonious taking and carrying away corn, or other produce of the soil, which the owner had severed from the freehold, was larceny at common law. It was personal property, and as essentially the subject of larceny, as any species of personal property. The allegation that the corn stolen was part of an *outstanding crop*, excludes the idea of its severance. It involves the fact that it was not severed; and that there was severance and asportation as one continuous act, constituting the trespass of the common law. Proof of nothing less will satisfy the averment.

Nor was it necessary to describe the corn as personal property. Such a description of it would perhaps have been improper. It is properly described as the property of the supposed owner, and thereby it is shown to be the subject of larceny under the statute. The last objection, that the corn is not averred to be part of an outstanding crop, is unfounded in fact.

We find no error in the record, and the judgment must be affirmed.

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*The Trespass and Carrying Away.*

*Eckels v. State, 20 Ohio St. 508. (1870.)*

ERROR to the court of common pleas of Hamilton county.

At the June term, 1870, of the court of common pleas of Hamilton county, the plaintiff in error was indicted for stealing one



hundred and twenty-five dollars in money of Christian Koehler. On the trial it was proved that the prisoner went into the boot and shoe store of Koehler in Cincinnati, and, passing about forty feet to the back part of the store where Koehler was cutting out work on a counter, asked the price of a pair of boots in the front show window, and took a seat in front of the counter. Koehler went to the window to get the boots, and, looking back while he was there, he discovered the prisoner behind the counter, with his hands down behind the counter where the money-drawer was situated. As Koehler started towards the prisoner, he returned to his seat in front of the counter. He was immediately arrested, and asked why he went behind the counter; to which he replied, that he "saw a rat run behind there." There were one hundred and twenty-one dollars in the drawer in bills of different denominations, which, shortly before the prisoner came, Koehler had assorted and arranged in three piles. The drawer was closed when Koehler went to the front window. When he returned it was partly open, and the money had been disturbed. It "was in a bunch in one corner of the drawer," with one bill partly out hanging over the drawer. No one but the prisoner had been at the drawer. "The money had the appearance of having been crumpled up in his hand," but was all found in the drawer. The prisoner was handed over to a police officer, to whom he stated that he was a stranger in the city, and that "this was the first job he tried on," etc.

The counsel for the prisoner requested the court to give the following charges to the jury, which were refused:

1. "That unless the proof shows affirmatively that money was taken out of the drawer, and in possession of the prisoner absolutely, the verdict must be not guilty. And that the circumstance that the drawer was found closed, or half open, even, or open entirely, and the money disordered, while it would strengthen direct testimony, is not sufficient in itself to warrant the jury in finding that the prisoner had the money in his possession."

2. "That the taking must be proved by the best evidence, which would be the possession of the money alleged to be taken, or the testimony of persons who actually saw the prisoner remove the money from the drawer and replace it."

3. "That the prosecutor must prove every fact which enters into the statement of the charge; and while it may be true that the prisoner entered that store with a felonious intent, and went to

the drawer with a felonious intent, still it is incumbent on the prosecutor to show, by affirmative evidence, beyond a reasonable doubt, that the prisoner actually took the money in his hand and removed it from the place it was placed by the owner."

The part of the charge of the court to the jury complained of is as follows:

"If the defendant removed the money from the place where Mr. Koehler had placed it, with the intention of stealing it, he would be guilty of larceny, even if he did not actually get it out of the drawer before being discovered. If he had actually taken the money into his hand, and lifted it from the place where the owner had placed it, so as to entirely sever it from the spot where it was so placed, with the intention of stealing it, he would be guilty of larceny, though he may have dropped it into the place it was lying, upon being discovered, and never have had it out of the drawer."

To the refusal of the court to charge as requested, and to the charge as given, the counsel for the prisoner excepted.

The jury returned a verdict of guilty; thereupon the counsel for the prisoner moved for a new trial, on the ground that the verdict was against the law and the evidence, and for error in the charge of the court to the jury. The court overruled the motion, and exceptions were taken.

Judgment and sentence were rendered upon the verdict, to reverse which this writ of error is prosecuted.

DAY, J.:

It is claimed on behalf of the plaintiff in error that the charge given to the jury was erroneous; and that the court erred in refusing to charge as requested, and in refusing to grant a new trial. These are the alleged errors chiefly relied on for a reversal of the judgment.

The material question made under each of these assignments of error is, where there is an intent to steal goods, "what is a sufficient taking and carrying away to constitute the crime of larceny?"

"In order to constitute the offence of larceny, there must be an actual taking, or severance of the thing, from the possession of the owner, for, as every larceny includes a trespass, if the party be not guilty of a trespass in taking the goods, he cannot be guilty of a felony in carrying them away." *Roscoe's Crim. Ev.* 587; 2 *Russ. on Crimes*, 5.

There must also be a carrying away of the goods taken. When this is done the offence is complete,—the crime is committed,—and cannot be purged by a return of the goods, though the possession be retained but for a moment. 3 Greenleaf's Ev. sec. 156; 2 Russ. on Crimes, 6.

The felony lies in the very first act of removing the property; therefore the least removing of the entire thing taken, with an intent to steal it, if the thief thereby, for the instant, obtain the entire and absolute possession of it, is a sufficient asportation, though the property be not removed from the premises of the owner, nor retained in the possession of the thief. Thus, where the defendant, with a felonious intent, lifted a bag from the bottom of the front boot of a coach, but, before getting it completely out of the space it had occupied, he was detected; yet as each part of it had been removed from the space which that specific part occupied, the asportation was held to be complete. *Rex v. Walsh*, 1 Moody, 14. So where the prisoner moved a parcel of goods from the fore-part to near the tail of a wagon, when he was detected; it was held that, as the prisoner had removed the property from the spot where it was placed, with an intent to steal, the asportation was sufficient to constitute the offence. 2 East P. C. 556. Also where a lady's ear-ring was torn from her ear, and at the same time lost in her hair; inasmuch as it was, for an instant, in the possession of the prisoner, separate from the owner's person, it was held that the asportation was complete. 2 East P. C. 557. See also 2 Wat. Arch. [380]; Rose. Crim. Ev. [588, 589], and 3 Greenleaf's Ev. secs. 154 and 155.

On the other hand, there is a class of cases, where the property taken is not entirely moved from the spot where it was placed by the owner, or where it is attached to some other thing not moved, or to the person of the owner. In this class of cases it has been held that there was no asportation, since there was no complete severance of the property from the possession of the owner. 2 East P. C. 556; 1 Hale P. C. 508. "In these cases," says Bishop, in his work on Criminal Law (vol. 2, sec. 804 [699]), "the prisoner's control over the thing was not for an instant perfect; if it had been, it would have been sufficient, even though the control had the next instant been lost. So the court held, where a man's watch and chain were forced from his pocket, but the key of the watch immediately caught and fastened itself upon a button, the

larceny was complete." 29 Eng. L. & Eq. 530. So also where the prisoner drew a pocket-book out of the inside breast-pocket of the prosecutor's coat, about an inch above the top of the pocket, and, being then suddenly apprehended, let go the pocket-book, and it fell back again into the pocket, the asportation was held sufficient to constitute the crime of larceny. *Rex v. Thompson*, 1 Moody, 78. So it is said that "drawing a sword partly out of the scabbard will constitute a complete asportavit." 2 Russ. on Crimes, 6.

It would seem, then, that the test as to the felonious asportation of property is not the fact that it has been taken out of the place of its deposit, but rests in the removal of the entire property by the thief, however slight, while it is in his absolute possession.

Let us apply the principles thus settled by the authorities to the case before us. If it stood alone upon the first sentence of the charge in question, while it is correct as a general proposition, it may be regarded as too general if nothing further had been added; for, possibly, the defendant might have moved the money in the drawer without having obtained the entire and absolute possession of it. But the court immediately proceeded to exclude this possibility from the meaning of the first sentence, by adding a clear and more definite statement of the same proposition, defining what kind of a taking and removal of the money was necessary to constitute the offence. The first sentence is merely a general statement of the law, with a denial of what had been claimed on the part of the defendant, that there could be no larceny unless the money was taken *out* of the drawer. We do not think its generality could mislead the jury, being, as it is, but a part of the charge which clearly controlled the general language, so as to exclude the idea that any removal of the money would be sufficient to constitute the offence, unless the defendant feloniously obtained the entire and absolute possession of it.

The court charged the jury that, "If he had actually taken the money into his hand, and lifted it from the place where the owner had placed it, so as to entirely sever it from the spot where it was so placed, with the intention of stealing it, he would be guilty of larceny, though he may have dropped it into the place it was lying, upon being discovered, and never have had it out of the drawer."

The charge recognizes the necessity of a felonious taking of the property, that it must be severed, and lifted or carried, from the place where it was left by the owner, and be, for the instant, at

least, in the entire and absolute possession of the party accused: this, according to the authorities, constitutes larceny, though the money may have been dropped where it was found, and never taken out of the drawer; for it is "well settled that the felony lies in the very first act of removing the property." 2 Russ. on Crimes, 5.

This view of the case goes far to dispose of the questions made on the refusal of the court to instruct the jury as requested on behalf of the prisoner. The charges requested were contained in three distinct propositions, neither of which, as a whole, was correct, and, therefore, according to the well-settled rule in this State, might be properly refused. The first might be refused because it requested the court to instruct the jury that they must acquit the prisoner unless the proof showed that the money was taken *out* of the drawer. The second might be rejected for the same reason, and, also, for the further reason, that it precluded a conviction except upon direct evidence, or evidence of the possession of the money by the prisoner. There was no error in refusing to charge as requested in the third proposition, for it was embraced in the charge given to the jury, unless by the words, "affirmative evidence," it was intended to request a charge that a conviction could not be produced without *direct* or *positive* evidence that the prisoner took the money in his hands and removed it. From the context, and the use of the term "affirmative" in other parts of the requests, it would seem that this was the sense in which it was used: if so, the request was properly refused, for it excluded the possibility of finding the facts that constitute the offence charged upon circumstantial evidence, which may be equally satisfactory and certain as that of a direct character.

It remains to determine whether the court erred in overruling the motion for a new trial. This raises the question whether the evidence was sufficient to warrant a conviction. The felonious intent of the accused is not questioned. Nor are we prepared to say that the jury were not warranted in finding, from the evidence, that he took the money into his entire and absolute possession, severed it from the possession of the owner, for the moment at least, and removed it from the place where it was before. We cannot say the jury could not fairly find that the money was taken, and that the "first act of removing" it was complete. The case is a close one. Between innocence and guilt there is, in law,

but a line: the jury found that the defendant had crossed it. From the evidence, we cannot say he had not. Nor could the court below. It was a case, therefore, where the court might properly refuse to grant a new trial on the ground that the verdict was not sustained by the evidence.

There are some minor questions made upon the record, in which, however, we see no error; but, as they are not urged here, they need not be further noticed.

It follows that the judgment of the common pleas must be affirmed.

SCOTT, C. J., and WELCH, WHITE, and McILVAINE, J. J., concurred.

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*The Intent and Purpose.*

*State v. Slingerland, 19 Nev. 135. (1885.)*

By the Court, LEONARD, J.:

Appellant was convicted of the crime of grand larceny. He appeals from the judgment, and the order overruling his motion for new trial. He was accused and found guilty of stealing two horses, two saddles, and a pair of spurs. He admitted that he took the property, and removed it about five miles away. He said his object was to put the owner to all the expense and trouble possible in order to find the property; that he had no idea of benefiting himself in any way, his only object having been to get revenge.

I. The court instructed the jury that if they believed beyond a reasonable doubt that the defendant took the property, as alleged in the indictment, with the intent to permanently deprive the owner of the property, and without an intention to return the same, it was a felonious intent, and the defendant was guilty. It is claimed that this instruction is erroneous in stating that the crime of grand larceny may be committed, although the taker of the property alleged to have been stolen derives no benefit, and does not intend or expect to be benefited therefrom. If one of the essential elements of larceny is an intention to profit by the conversion of the property, then the instruction under consideration was incorrect. A court cannot instruct a jury that certain facts constitute a certain offense, unless every essential fact necessary to

constitute the offense be included in the statement. (*Weston v. U. S.*, 5 Cranch C. C. 494.) Although the authorities upon this question are somewhat conflicting, those sustaining the instruction greatly preponderate, and in our opinion they are upheld by good sense and sound reason.

In *State v. Ryan*, 12 Nev. 403, this court acknowledged the correctness of the principle that where the intent is to deprive the owner of his property, it is not essential that the taking should be with a view to pecuniary profit.

In *Dignowitty v. State*, 17 Tex. 530, the court said: "But to constitute the felonious intent, it is not necessary that the taking should be done *lucri causa*; taking with an intention to destroy will be sufficient to constitute the offense, if done to serve the offender, or another person, though not in a pecuniary way."

And, said the court, in *Hamilton v. State*, 35 Miss. 219: "The rule is now well settled that it is not necessary, to constitute larceny, that the taking should be in order to convert the thing stolen to the pecuniary advantage or gain of the taker, and that it is sufficient if the taking be fraudulent, and with an intent wholly to deprive the owner of the property. (Roscoe, Cr. Ev., 533, 2d ed.; Cabbage's Case, Russ. & R. 292; *Rex v. Morfit*, Id. 308.) And it is said by the commissioners of criminal law in England that 'the ulterior motive by which the taker is influenced in depriving the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial.' The rule we consider to be in accordance with the principle on which the law of larceny rests, which is to punish the thief for wrongfully and feloniously depriving the owner of his property. The reason of the law is to secure a man's property to him, and that is to be carried out, rather by punishing the thief for feloniously depriving him of it, than for wrongful gain he has made by the theft. The moral wrong is founded in the wrongful and felonious deprivation."

Sustaining the same doctrine in *Warden v. State*, 60 Miss. 640, the court said: "It seems to meet the approval, also, of most of the modern writers on criminal law, and to be sanctioned by many cases, both English and American."

In *State v. South*, 28 N. J. Law, 28, the question was, whether the fraudulently depriving the owner of the temporary use of a chattel is larceny at common law; whether the felonious intent or

*animus furandi* may consist with an intention to return the chattel to the owner. It was held that if the property is taken with the intention of using it temporarily only, and then returning it to the owner, it is not larceny; but if it appear that the goods were taken with the intention of permanently depriving the owner thereof, then it is larceny. And in *State v. Davis*, 38 N. J. Law, 177, the same court adhered to the doctrine announced in *South's Case*, and said: "There has been no case decided in this state that has held that where the taker had no intention to return the goods, that the taking was merely temporary. Nor is there anything that should control the action of the jury, or the court acting as such under the statute, when they find that the party having no such intent is guilty of larceny. It would be a most dangerous doctrine to hold that a mere stranger may thus use and abuse the property of another, and leave him the bare chance of recovering it by careful pursuit and search, without any criminal responsibility in the taker."

In *Berry v. State*, 31 Ohio St. 219, and *Com. v. Mason*, 105 Mass. 166, it was held that the wrongful taking of the property of another, without his consent, with intent to conceal it until the owner offered a reward for its return, and for the purpose of obtaining the reward, was larceny of the property taken. (And see also *People v. Juarez*, 28 Cal. 380; *State v. Brown*, 3 Strobb. 516; *Keely v. State*, 14 Ind. 36; *Rex v. Cabbage*, Russ. & R. 292; *Rex v. Morfit*, Id. 307; note *a* to *Holloway's Case*, 1 Denison Cr. Cas. 376.) Counsel for appellant places great reliance upon *State v. Hawkins*, 8 Port. (Ala.) 461, wherein it was held that taking a slave in order to set her free was not larceny; but the doctrine of that case has been repudiated by the same court in the case of *Williams v. State*, 52 Ala. 413, decided in 1875, wherein it was said: "The second charge was also properly refused. To constitute the offense of larceny, it is not necessary the taking should have been with an intent to appropriate the goods to the use or benefit of the person taking. The criminal intent consists in the purpose to deprive the owner of his property. No benefit to the guilty agent may be sought, but only injury to the owner."

Reliance is also placed upon section 1783 of Wharton's American Criminal Law, where the author says: "In this country there has been some reluctance to accept this supposed modification of the common-law definition of larceny, and in one or two cases it



has been expressly rejected. Thus it has been declared not to be larceny, but malicious mischief, to take the horse of another, not *lucri causa*, but in order to destroy him;" citing *State v. Council*, 1 Tenn. 305; *Com. v. Leach*, 1 Mass. 59; *People v. Smith*, 5 Cow. 258; and *State v. Wheeler*, 3 Vt. 344, as authorities for the statement.

It will be found, upon an examination of those cases, that no one of them sustains the text.

Mr. Stephen, in his General View of the Criminal Law of England, 127, says: "It is larceny to take and carry away a personal chattel from the possession of its owner with intent to deprive him of the property."

Mr. Roscoe, in his Criminal Evidence, 631, says: "Eyre, C. B., in the definition given by him, says, 'Larceny is the wrongful taking of goods with intent to spoil the owner of them *lucri causa*;' and Blackstone says, 'The taking must be felonious; that is, done *animo furandi*, or, as the civil law expresses it, *lucri causa*.' The point arrived at by these two expressions, *animo furandi* and *lucri causa*, the meaning of which has been much discussed, seems to be this: that the goods must be taken into the possession of the thief with the intention of depriving the owner of his property in them.

\* \* \* Property is the right to the possession, coupled with an ability to exercise that right. Bearing this in mind, we may perhaps safely define larceny as follows: The wrongful taking *possession* of the goods of another with intent to deprive the owner of his *property* in them." (And see Archb. Crim. Pr. & Pl., Pomeroy's notes, 1185; Barb. Crim. Law, 174; 2 Bish. Crim. Law, 848.)

Against these authorities, besides Hawkins's case and Wharton, above cited, we are referred to four cases, viz.: *People v. Woodward*, 31 Hun, 57; *Smith v. Schultz*, 1 Scam. 490; *Wilson v. People*, 39 N. Y. 459; and *U. S. v. Durkee*, 1 McAll. 196. In Woodward's case there was an able and exhaustive dissenting opinion by one of the three justices, and no authorities are cited in support of the majority opinion except Whart. Crim. Law, sec. 1784, and certain cases therein referred to, which do not sustain the text. In *Smith v. Schultz*, the court only says: "Every taking of the property of another without his knowledge or consent does not amount to larceny. To make it such, the taking must be

accompanied by circumstances which demonstrate a felonious intention."

But the court does not say there can be no felonious intent except there be a taking *lucri causa*. In *Halloway's Case*, Parke, B., defined "felonious" to mean that there is no color of right or excuse for the act, and the intent must be to deprive the owner, not *temporarily*, but *permanently*, of the property. In *Wilson's Case* it was only decided that the felonious intent must exist at the time of the taking. In *Durkee's Case* the court instructed the jury as follows: "1. That if you believe, from the evidence, that the prisoner took and carried away the arms with the intent to appropriate them, or any portion of them, to his own use, or permanently deprive the owner of the same, then he is guilty. 2. But if you shall believe that he did not take the arms for the purpose of appropriating them, or any part thereof, to his own use, and only for the purpose of preventing their being used on himself or his associates, then the prisoner is not guilty."

There is nothing in the instructions quoted opposed to the doctrine we are endeavoring to maintain, although there is much in the address to the jury which does not accord with our ideas of the law. To constitute larceny the taking must be felonious, and it is so when the intent is to permanently deprive the owner of his property against his will. The court did not err in giving the fourth instruction.

2. Objection is made to the third instruction, which is substantially the same as was given in *Hing's Case*, 16 Nev. 310. (See also *People v. Cronin*, 34 Cal. 203, and *People v. Morrow*, 60 Cal. 147.) When a defendant in a criminal case offers himself as a witness in his own behalf, it is the duty of the jury to give to his evidence all the credit to which it is entitled; but in ascertaining the extent of its credibility, it is proper and necessary to consider the situation in which he is placed. A person accused of a crime may speak the truth, and it is for the jury to say, in view of all the facts, whether or not he has done so, in the whole or in part. They should give proper weight and effect to all of his evidence, if they are convinced of its truth, or so much thereof as, in their best judgment, is entitled to credit. Such, we think, is the natural construction to be placed upon the instruction under consideration.

3. The second instruction was correct. (*People v. Cronin*, 34 Cal. 191; *State v. Nelson*, 11 Nev. 341.)

4. The first instruction given on behalf of the state is as follows: "The court instructs the jury that the good character of the defendant can only be taken into consideration when the jury have a reasonable doubt as to whether the defendant is the person who committed the offense with which he is charged; and if you believe from the evidence that the defendant is guilty, then if the defendant has proved a previous good character, such good character would be of no avail to him, and would not authorize an acquittal."

The first part of this instruction was copied from that given in *People v. Gleason*, 1 Nev. 176, and in that case upheld by this court. The last portion was taken from the court's instruction in *Levigne's Case*, 17 Nev. 445, given in connection with two other instructions requested by the defendant. In that case we said: "By the three instructions under consideration the jury were charged to consider all the testimony admitted in the case, including that in relation to previous good character, and if, from the whole, they believed the defendant guilty, then they should not acquit him, although he had borne a good character previously."

Such we declared was the true rule. It was consonant with reason, and upheld by the latest and best authorities.

The instruction given and upheld in *Gleason's case* we do not like; and we did not say that the court's instruction in *Levigne's case* would have been correct by itself alone. We only declared it correct as it was given, in connection with the two requested by defendant. We do not like the first instruction given in this case. All in all, it conveys to our minds the idea that evidence of the defendant's good character could not be considered, unless, from the other evidence admitted, the jury had a reasonable doubt of the defendant's guilt. Upon the question of guilt or innocence, they should have been charged to consider all the evidence in the case, including that in relation to character, and if therefrom they believed him guilty beyond a reasonable doubt, previous good character would not authorize an acquittal.

But although the instruction in question was not proper, it ought not, in this case, to reverse the judgment, because the undisputed facts, his own testimony included, made him guilty, no matter how fair a character he had previously borne. He admitted the taking, and did not claim that he intended to return the property to the owner at any time. It was not to be returned, and the

owner was not to get it back, unless, after much trouble and expense, he might succeed in finding it. After the larceny was committed, he told the owner that he had taken the property, and where it could be found; but this was done in consideration of a promise not to prosecute him for taking another horse, not voluntarily. The jury must have found that appellant intended to deprive the owner permanently of his property, for they were instructed to acquit him if he took it with the intent to hide the same and make trouble for the owner, and then return it, and not to derive any benefit therefrom. If appellant had taken the property just as he did, for the purpose of gain to himself, rather than out of revenge, it is conceded that he would have been guilty of the offense charged. In that case, no amount of testimony establishing former good character could have induced a doubt of guilt. In view of our conclusion upon the fourth instruction, the same is true now.

Judgment and order appealed from affirmed.

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#### EMBEZZLEMENT.

##### *Nature of the Offense.*

*Commonwealth v. Hays, 14 Gray (Mass.) 62. (1859.)*

INDICTMENT on St. 1857, c. 233, which declares that "if any person, to whom any money, goods or other property, which may be the subject of larceny, shall have been delivered, shall embezzle, or fraudulently convert to his own use, or shall secrete, with intent to embezzle or fraudulently convert to his own use, such money, goods, or property, or any part thereof, he shall be deemed, by so doing, to have committed the crime of simple larceny." The indictment contained two counts, one for embezzlement, and one for simple larceny.

At the trial in the court of common pleas in Middlesex, at October term 1858, before Aiken, J., Amos Stone, called as a witness by the Commonwealth, testified as follows: "I am treasurer of the Charlestown Five Cent Savings Bank. On the 17th day of October, 1857, the defendant came into the bank, and

asked to draw his deposit, and presented his deposit book. I took his book, balanced it, and handed it back to him. It was for one hundred and thirty dollars in one item. I then counted out to him two hundred and thirty dollars, and said, 'There are two hundred and thirty dollars.' The defendant took the money to the end of the counter, and counted it, and then left the room. Soon after the defendant had left, I discovered that I had paid him one hundred dollars too much. After the close of bank hours I went in search of the defendant, and told him that I had paid him one hundred dollars too much, and asked him to adjust the matter. The defendant asked me how I knew it. He asked me if I could read. I said 'Yes.' He then showed me his book, and said, 'What does that say?' I took it, and read in it one hundred and thirty dollars. The defendant then said, 'That is what I got.' He exhibited two fifties, two tens, and a ten dollar gold piece, and said, 'That is what I got.' I then said to him, 'Do you say that is all and precisely what I gave you?' He replied, 'That is what I got.' I then said to him, 'I can prove that you got two hundred and thirty dollars.' He replied, 'That is what I want; if you can prove it, you will get it; otherwise you won't.' I intended to pay the defendant the sum of two hundred and thirty dollars, and did so pay him. I then supposed that the book called for two hundred and thirty dollars. Books are kept at the bank, containing an account with depositors, wherein all sums deposited are credited to them, and all sums paid out are charged to them."

The defendant asked the court to instruct the jury that the above facts did not establish such a delivery or embezzlement as subjected the defendant to a prosecution under the St. of 1857, c. 233, and did not constitute the crime of larceny.

The court refused so to instruct the jury; and instructed them "that if the sum of two hundred and thirty dollars was so delivered to the defendant, as testified, and one hundred dollars, parcel of the same, was so delivered by mistake of the treasurer, as testified, and the defendant knew that it was so delivered by mistake, and knew he was not entitled to it, and afterwards the money so delivered by mistake was demanded of him by the treasurer, and the defendant, having such knowledge, did fraudulently, and with a felonious intent to deprive the bank of the money, convert the same to his own use, he would be liable under this indictment."

The jury returned a verdict of guilty, and the defendant alleged exceptions.

BIGELOW, J.:

The statute under which this indictment is found is certainly expressed in very general terms, which leave room for doubt as to its true construction. But interpreting its language according to the subject matter to which it relates, and in the light of the existing state of the law, which the statute was intended to alter and enlarge, we think its true meaning can be readily ascertained.

The statutes relating to embezzlement, both in this country and in England, had their origin in a design to supply a defect which was found to exist in the criminal law. By reason of nice and subtle distinctions, which the courts of law had recognized and sanctioned, it was difficult to reach and punish the fraudulent taking and appropriation of money and chattels by persons exercising certain trades and occupations, by virtue of which they held a relation of confidence or trust towards their employers or principals, and thereby became possessed of their property. In such cases the moral guilt was the same as if the offender had been guilty of an actual felonious taking; but in many cases he could not be convicted of larceny, because the property which had been fraudulently converted was lawfully in his possession by virtue of his employment, and there was not that technical taking or asportation which is essential to the proof of the crime of larceny. *The King v. Bazeley*, 2 Leach (4th ed.), 835. 2 East P. C. 568.

The statutes relating to embezzlement were intended to embrace this class of offences; and it may be said generally that they do not apply to cases where the element of a breach of trust or confidence in the fraudulent conversion of money or chattels is not shown to exist. This is the distinguishing feature of the provisions in the Rev. Sts. c. 126, §§ 27-30, creating and punishing the crime of embezzlement, which carefully enumerate the classes of persons that may be subject to the penalties therein provided. Those provisions have been strictly construed, and the operation of the statute has been carefully confined to persons having in their possession, by virtue of their occupation or employment, the money or property of another, which has been fraudulently converted in violation of a trust reposed in them. *Commonwealth v. Stearns*, 2 Met. 343. *Commonwealth v. Libbey*, 11 Met. 64. *Commonwealth v.*

*Williams*, 3 Gray, 461. In the last named case it was held, that a person was not guilty of embezzlement, under Rev. Sts. c. 126. § 30, who had converted to his own use money which had been delivered to him by another for safe keeping.

The St. of 1857, c. 233, was probably enacted to supply the defect which was shown to exist in the criminal law by this decision, and was intended to embrace cases where property had been designedly delivered to a person as a bailee or keeper, and had been fraudulently converted by him. But in this class of cases there exists the element of a trust or confidence reposed in a person by reason of the delivery of property to him, which he voluntarily takes for safe keeping, and which trust or confidence he has violated by the wrongful conversion of the property. Beyond this the statute was not intended to go. Where money paid or property delivered through mistake has been misappropriated or converted by the party receiving it, there is no breach of a trust or violation of a confidence intentionally reposed by one party and voluntarily assumed by the other. The moral turpitude is therefore not so great as in those cases usually comprehended within the offence of embezzlement, and we cannot think that the legislature intended to place them on the same footing. We are therefore of opinion that the facts proved in this case did not bring it within the statute, and that the defendant was wrongly convicted.

*Exceptions sustained.*

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*Distinguished from Larceny.*

*Commonwealth v. Berry*, 99 Mass. 428. (1868.)

INDICTMENT, stated in the bill of exceptions to have been found on the Gen. Sts. c. 161, § 41, for embezzling bank bills of the amount and value of \$950.

At the trial in the superior court, before Brigham, J., these facts appeared: The defendant was in the employment of a firm of furniture dealers, consisting of Daniel Shaler and George W. Safford and others, who had a factory in South Boston and a warehouse in the city of Boston proper. His special duty was to drive a team; but he was liable to perform any other kind of service which might be assigned to him by his employers. On July 20, 1867, Shaler directed the defendant to get \$950 from Safford

at the warehouse, and bring the same to Shaler at the factory. In pursuance of this direction, the defendant applied to Safford for the money, and Safford delivered to him a package of bank bills of the amount and value requested. The defendant never carried the package to Shaler; but left the state; remained absent for several weeks; and on returning reported to his employers that after receiving the money he visited several tippling shops, became drunk and unconscious, and did not regain his senses till the morning of July 21, when he found himself lying in a doorway on Long Wharf in Boston, that he lost the money during this period of drunkenness, and that on discovering the loss his shame was such that on the afternoon of that day he ran away without first seeing his family or any of his friends, and without telling anybody of his misfortune. But there was also evidence offered to show that he left Boston on the afternoon of July 20.

The defendant asked the judge to rule "as to the defendant's relations to his employers, and the delivery of the property to him, that said facts proved, if any crime, the crime of simple larceny, and not embezzlement; that, if embezzlement, it was embezzlement within the Gen. Sts. c. 161, § 38; and that said indictment could not be maintained under the evidence." The judge refused so to rule; and instructed the jury, on the contrary, "that, if the defendant was guilty, he was guilty of embezzlement as set forth in said indictment, and not larceny." The jury returned a verdict of guilty; and the defendant alleged exceptions.

HOAR, J.:

The bill of exceptions states that this indictment was found under Gen. Sts. c. 161, § 41. It seems to be a good indictment under that section, or under § 35 of the same chapter. *Commonwealth v. Concannon*, 5 Allen, 506. *Commonwealth v. Williams*, 3 Gray, 461. But the more important question is, whether, upon the facts reported, an indictment can be sustained for the crime of embezzlement. The statutes creating that crime were all devised for the purpose of punishing the fraudulent and felonious appropriation of property which had been intrusted to the person, by whom it was converted to his own use, in such a manner that the possession of the owner was not violated, so that he could not be convicted of larceny for appropriating it. Proof of embezzlement will not sustain a charge of larceny. *Commonwealth v.*



*Simpson*, 9 Met. 138. *Commonwealth v. King*, 9 Cush. 284. In the case last cited, it is said by Mr. Justice Dewey that "the offences are by us considered so far distinct as to require them to be charged in such terms as will indicate the precise offence intended to be charged." "If the goods are not in the actual or constructive possession of the master, at the time they are taken, the offence of the servant will be embezzlement, and not larceny." We see no reason why the converse of the proposition is not true, that, if the property is in the actual or constructive possession of the master at the time it is taken, the offence will be larceny, and not embezzlement. And it has been so held in England. Where the prisoner was the clerk of A., and received money from the hands of another clerk of A. to pay for an advertisement, and kept part of the money, falsely representing that the advertisement had cost more than it had; it was held that this was larceny and not embezzlement, because A. had had possession of the money by the hands of the other clerk. *Rex v. Murray*, 1 Mood. 276; S. C. 5 C. & P. 145. The distinction is between custody and possession. A servant who receives from his master goods or money to use for a specific purpose has the custody of them, but the possession remains in the master.

The St. 14 & 15 Vict. c. 100, § 13, provided that whenever, on the trial of an indictment for embezzlement, it should be proved that the taking amounted to larceny, there should not be an acquittal, but a conviction might be had for larceny. We have no similar statute in this Commonwealth.

In the present case, the defendant, who was employed as a servant, was directed by one member of the firm who employed him to take a sum of money from him to another member of the firm. He had the custody of the money, but not any legal or separate possession of it. The possession remained in his master. His fraudulent and felonious appropriation of it was therefore larceny, and not embezzlement. *Commonwealth v. O'Malley*, 97 Mass. 584. *Commonwealth v. Hays*, 14 Gray, 62. *People v. Call*, 1 Denio, 120. *United States v. Clew*, 4 Wash. C. C. 702.

In *People v. Hennessey*, 15 Wend. 147, cited for the Commonwealth, the money embezzled by the defendant had never come into the possession of his master. And in *People v. Dalton*, 15 Wend. 581, the possession of the defendant was that of a bailee.

*Exceptions sustained.*

*Intent.*

*People v. Hurst, 62 Mich. 276. (1886.)*

Exceptions from recorder's court of Detroit. (Swift, R.)  
Argued June 23, 1886. Decided July 1, 1886.

Embezzlement. Respondent was convicted. Conviction quashed, and court advised to discharge the prisoner. The facts are stated in the opinion.

CAMPBELL, C. J.:

Respondent was convicted of embezzling \$275, alleged to have been put in his hands by one Lena J. Smith as her agent. Respondent was a lawyer, and also engaged more or less in renting houses. Mrs. Smith formed his acquaintance while seeking to rent a house. She got him to lend \$400 for her, which he did on mortgage. She further said she had \$1,100 more to lend. He said he had a place for \$700, which he actually lent on first mortgage. He also showed her a letter from a man who had a parcel of 40 acres of land to sell, and he wanted her to give him the money to buy it, as he knew of a purchaser who would buy at an advance. She handed him \$400 to buy the land, and said he might have the profit. He told her where the land was, but she could not remember, and did not testify upon that point. This was on March 31, 1882. The embezzlement is charged as of that day.

About the middle of April she saw him at his house, intoxicated. She asked him for her papers, and if he had invested the money, and he shook his head, and said he had been "on a drunk." She asked for her money, and he gave her \$100, and a chattel mortgage which he owned for \$25. She asked him if that was all he had, and he said it was, and promised to pay the balance in a month or two, and asked her to wait on him. She called on him frequently, and in the fall he conveyed to her 40 acres of land in Cheboygan county as security until he could pay her. He said he was selling some land for a lady in Springwells; and, if he succeeded, his commissions would exceed his debt to her, and he would pay her, and she could return the deed, which she need not record, but he would pay for recording. She agreed to wait on him, and hold the deed as security a little longer, until he could sell the 25 acres

referred to. She subsequently dunned him frequently, and, finding he had an interest in a patent right, asked him to assign that to her as security, which he did.

There was some other testimony which was material, in favor of defendant, on which his counsel made some points, which we do not now think it necessary to decide.

In our opinion, the testimony did not make out a case of embezzlement. Before that offence can be made out, it must distinctly appear that the respondent has acted with a felonious intent, and made an intentionally wrong disposal, indicating a design to cheat and deceive the owner. A mere failure to pay over is not enough if that intent is not plainly apparent. This was decided in *People v. Galland*, 55 Mich. 628. See, also, *Reg. v. Norman*, 1 Car. & M. 501; *Reg. v. Creed*, 1 C. & K. 63; *Rex v. Hodgson*, 3 Car. & P. 422; 2 Russ. Cr. 182; 2 Bish. Crim. Law, §§ 376, 377.

In this case there was nothing indicating concealment or a felonious disposition. A candid admission was made at once on inquiry, and partial payment was made and security given at different times, when asked. The debt was admitted and recognized as a debt on both sides. Whatever wrong may have been done, there was no embezzlement proven.

The conviction must be quashed, and the court below advised to discharge the prisoner.

The other Justices concurred.

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#### FALSE PRETENSES.

*Commonwealth v. Drew*, 19 Pick. (Mass.) 179. (1837.)

The defendant was tried, before Morton, J., upon two indictments, in each of which he was charged with having procured money from the Hancock bank in Boston, by false pretences and with intent to defraud the bank, upon two several occasions.

The pretences alleged were, 1. that the defendant assumed the name of Charles Adams; 2. that he pretended that he wished to open an honest and fair account with the Hancock bank, and to deposit and draw for money in the usual manner and ordinary course of business; and 3. that he pretended that two checks, described in the indictment, were good, and that he had in deposit the amount for which they were drawn.

It was proved, among other things, that the defendant began to deposit money in the bank early in December, 1835, and that he continued to deposit and draw, at various times and in various sums, until the 27th of January, 1836, on which day, having only \$10 deposited to his credit, he drew a check for \$100, which was paid at the bank.

On the 30th of January, 1836, a check for \$350 was drawn by the defendant and paid at the bank, he having made no deposit since the payment of the check presented on the 27th of January.

The defendant deposited and drew his checks by the name of Charles Adams, and there was another person named Charles Adams who deposited at the bank at the same time; but it was not contended on the part of the Commonwealth, that the checks were paid because of the assumption by the defendant of the name of Charles Adams, nor that any mistake was made as to which person of that name drew the check.

Samuel B. Dyer, a witness on the part of the Commonwealth, testified that he was the paying and receiving teller of the bank; that the defendant first did business at the bank on the 12th of December, 1835; that he asked to have a large bill of the United States bank exchanged for small bills, which was done; that before he left the bank he made a deposit of a considerable sum, including the bills just before received as above; that being asked in what name he wished to deposit, he said, in the name of Charles Adams; that he saw the defendant several times afterwards, when he presented his checks for payment; that the defendant usually drew his checks in the bank, at the desk kept for that purpose, and presented them himself, and that this was usually done by him about 12 o'clock, the most busy time in the forenoon; that the witness had no recollection of the presentation or payment of either of the two checks in question, which were overdrafts; that he knew they were paid out of his drawer, and by his money, because he found the checks in his drawer and missed sums of money corresponding with the amount of the checks; that he believed that the check of January 27th was not paid by himself, but by the bank messenger for him, who took his place a few minutes at the counter, the messenger having told him he had paid a check of Charles Adams; that the witness paid checks of the defendant unhesitatingly, because he had deposited for some time, and the witness presumed his checks to be good, from the general char-

acter of his account, and having seen him conversing with the president of the bank, the witness presumed he was acquainted with the president; that if the witness paid either of the two checks in question, without inquiring at the desk of the book-keeper, or looking at the balance-sheet, to ascertain whether the defendant had money to that amount deposited, it was upon these grounds that he so paid.

It was in evidence, that the book-keeper's desk was a few feet from the teller's counter; that when the teller doubted whether a check should be paid, he inquired of the book-keeper, or looked at the balance-sheet kept by the book-keeper, which was made up to the end of every day, and lay upon the desk for the inspection of the teller or book-keeper at all times.

It was testified by the teller, that the overdraft of the 27th of January was not reported for some days after it happened; and the balance-sheet showed that it did not appear upon that book until the 1st of February.

In order to show that the defendant overdrew with a fraudulent intent, it was proved, amongst other things, that he overdrew, about the same time, at the Bunker Hill bank in Charlestown, and the Traders' bank in Boston.

The counsel for the defendant contended, that there was no evidence of the procuring of money by any false pretence; that the mere drawing a check and presenting it at the counter of the bank to the teller for payment, no words being spoken and no false appearance or token presented or held out, although the drawer knew he had no funds deposited there, was not a "false pretence," within the meaning of the statute upon that subject; and that such presentation of a check, with intent to defraud the bank, and receiving the money upon the check, did not constitute the crime of obtaining money by false pretences, as defined by the statute; that it was no more than an appeal to the books of the bank, kept by the proper officer, and an offer to receive what should there be found due. But the judge overruled these objections, and instructed the jury, that if they believed that the defendant became a depositor at the bank under a pretence of doing business there in the usual manner, but with the fraudulent design to obtain the money of, and cheat the bank, and drew the checks and presented them at the bank for payment, knowing that he had not funds deposited sufficient to pay them, and that he did this intending to

defraud the bank of the sums so overdrawn, although no words were spoken and no other token exhibited, and if he actually got the money, he was guilty of the crime of obtaining money by false pretences within the meaning of the statute. And it was left to the jury to decide upon all the evidence, whether the false pretences and the averments contained in the indictment were proved to their satisfaction or not.

The jury found a verdict against the defendant upon both indictments.

The defendant moved for a new trial, because of the ruling and instructions of the judge, and because the verdict, as to the presentation of the checks by the defendant, was not supported by the evidence.

MORRIS, J., delivered the opinion of the court. These indictments are founded upon St. 1815, c. 136. The first section provides, "that all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons money, goods, wares, merchandise or other things, with intent to cheat or defraud any person or persons of the same, shall on conviction" be punished, &c., as therein specified. This section, which is a copy of St. 30 Geo. 2, c. 24, § 1, is revised and combined with some provisions in relation to other similar offences, in the Revised Stat. c. 126, § 32.

To constitute the offence described in the statute and set forth in these indictments, four things must concur and four distinct averments must be proved.

1. There must be an intent to defraud;
2. There must be an actual fraud committed;
3. *False pretences* must be used for the purpose of perpetrating the fraud; and
4. The fraud must be accomplished by means of the false pretences made use of for the purpose, viz., they must be the cause which induced the owner to part with his property.

It is very obvious that three of the four ingredients of the crime exist in the present case. The fraudulent intent, the actual perpetration of the fraud, and the fact that some of the pretences used were the means by which it was accomplished, are established by the verdict of the jury. And although the prisoner's counsel has objected to the sufficiency of the evidence, yet we see no reason to question the correctness of their decision. It only remains for

us to inquire, whether the artifices and deceptions practiced by the defendant and by means of which he obtained the money, are the *false pretences* contemplated by the statute.

The *pretences* described in the indictments and alleged and shown to be false, are,

1. That the defendant assumed the name of Charles Adams.
2. That he pretended that he wished to open an honest and fair account with the Hancock bank and to deposit and draw for money in the usual manner and ordinary course of business.
3. That he pretended that the checks were good, and that he had in deposit the amount for which they were drawn.

The first is clearly a false pretence within the meaning of the statute. And had the money been obtained by means of the assumption of this fictitious name, there could be no doubt of the legal guilt of the defendant. The eminent lawyer who filled the office of mayor of New York when the adjudication referred to by the defendant's counsel was made, says the false pretences must be the sole inducement which caused the owner to part with his property. *People v. Conger*, 1 Wheeler's Crim. Cas. 448; *People v. Dalton*, 2 Ibid. 161. This point is doubtless stated too strongly; and it would be more correct to say, that the false pretences, either with or without the coöperation of other causes, had a decisive influence upon the mind of the owner, so that without their weight, he would not have parted with his property. *People v. Haynes*, 11 Wendell, 557. But in this case the assumed name, so far from being the *sole* or *decisive* inducement, is clearly shown to have had no influence whatever. The bank officers did not confound the defendant with Charles Adams, and it does not appear that the defendant knew that there was any other person by that name. He never claimed any credit on account of his name, and the coincidence might have been accidental. At any rate it had no influence upon the credit of either, nor any effect upon their accounts or the payment of their checks.

2. The opening and keeping an account with the Hancock bank might have been, and doubtless was, a part of a cunning stratagem, by which the defendant intended to practice a fraud upon that bank. But the business was done and the account kept in the usual manner. The defendant made his deposits and drew his checks like other customers of the bank. He made no representation of the course he intended to pursue and gave no assurance

of integrity and fair dealing. And we can see nothing in the course of this business, constituting it a false pretence, which would not involve the account of any depositor who might overdraw, in the same category.

3. The *pretence*, if any such there were, that the check was good, or that the defendant had funds in the bank for which he had a right to draw, was *false*. He had no such funds. Did the defendant make any such pretence? He made no statement or declaration to the officers of the bank. He merely drew and presented his checks and they were paid. This was done in the usual manner. If then he made any pretence, it must result from the acts themselves.

What is a false pretence, within the meaning of the statute? It may be defined to be a representation of some fact or circumstance, calculated to mislead, which is not true. To give it a criminal character there must be a *scienter* and a fraudulent intent. Although the language of the statute is very broad, and in a loose and general sense, would extend to every misrepresentation, however absurd or irrational, or however easily detected; yet we think the true principles of construction render some restriction indispensable to its proper application to the principles of criminal law and to the advantageous execution of the statute. We do not mean to say that it is limited to cases against which ordinary skill and diligence cannot guard; for one of its principal objects is to protect the weak and credulous from the wiles and stratagems of the artful and cunning; but there must be some limit, and it would seem to be unreasonable to extend it to those who, having the means in their own hands, neglect to protect themselves. It may be difficult to draw a precise line of discrimination applicable to every possible contingency, and we think it safer to leave it to be fixed in each case as it may occur. 2 East's P. C. 828; *Young v. The King*, 3 T. R. 98.

It is not the policy of the law to punish criminally mere private wrongs. And the statute may not regard naked lies, as false pretences. It requires some artifice, some deceptive contrivance, which will be likely to mislead a person or throw him off his guard. He may be weak and confiding and his very imbecility and credulity should receive all practical protection. But it would be inexpedient and unwise to regard every private fraud as a legal crime. It would be better for society to leave them to civil remedies. Ros-



coe on Crim. Ev. (2d ed.) 419; Goodhall's case, Russ. & Ryan, 461.

The pretence must relate to past events. Any representation or assurance in relation to a future transaction, may be a promise or covenant or warranty, but cannot amount to a statutory false pretence. They afford an opportunity for inquiring into their truth, and there is a remedy for their breach, but it is not by a criminal prosecution. Stuyvesant's case, 4 City Hall Recorder, 156; Roseoe on Crim. Ev. (2d ed.) 422; *Rex v. Codrington*, 1 Carr. & Payne, 661. The only case, *Young v. The King*, 3 T. R. 98, which has been supposed to conflict with this doctrine, clearly supports it. The false pretence alleged was, that a bet had been made upon a race which was to be run. The contingency which was to decide the bet was *future*. But the making of the bet was *past*. The representation which turned out to be false was, not that a race *would be* run, but that a bet *had been* made. The false pretence therefore in this case related to an event already completed and certain, and not to one which was thereafter to happen and consequently uncertain. And the decision was perfectly consistent with the doctrine and law here laid down.

A false pretence, being a misrepresentation, may be made in any of the ways in which ideas may be communicated from one person to another. It is true that the eminent jurist before referred to, in the cases cited held that it could be made only by verbal communications, either written or oral. If this be correct, no acts or gestures, however significant and impressive, could come within the statute. And mutes, though capable of conveying their ideas and intentions in the most clear and forcible manner, could hardly be brought within its prohibition. Can it make any difference in law or conscience, whether a false representation be made by words or by the expressive motions of the dumb? Each is a language. Words are but the signs of ideas. And if the ideas are conveyed, the channel of communication or the garb in which they are clothed, is but of secondary importance. And we feel bound to dissent from this part of these decisions. In this we are supported by the English cases. *Rex v. Story*, Russ. & Ryan, 81; *Rex v. Freeth*, Ibid. 127.

The representation is inferred from the act, and the pretence may be made by implication as well as by verbal declaration. In the case at bar the defendant presented his own checks on a bank

with which he had an account. What did this imply? Not necessarily that he had funds there. Overdrafts are too frequent to be classed with false pretences. A check, like an order on an individual, is a mere request to pay. And the most that can be inferred from passing it is, that it will be paid when presented, or in other words, that the drawer has in the hands of the drawee either funds or credit. If the drawer passes a check to a third person, the language of the act is, that it is good and will be duly honored. And in such case, if he knew that he had neither funds nor credit, it would probably be holden to be a false pretence.

In the case of *Stuyvesant*, 4 City Hall Recorder, 156, it was decided that the drawing and passing a check was not a false pretence. But in *Rex v. Jackson*, 3 Campb. 370, it was ruled that the drawing and passing a check on a banker with whom the drawer had no account and which he knew would not be paid, was a false pretence within the statute. This doctrine appears to be approved by all the text writers, and we are disposed to adopt it. Roscoe on Crim. Ev. (2d ed.) 419.

But to bring these cases within the statute, it must be shown that the drawer and utterer knew that the check would not be paid, and in the cases cited it appeared that he had no account with the banker. In these respects the case at bar is very distinguishable from the cases cited. If the checks in question had been passed to a third person, it could not be said that the defendant knew that they would not be paid. On the contrary, he had an open account with the bank, and although he knew there was nothing due to him, yet he might suppose that they would be paid. And the fact that he presented them himself, shows that he did not know that they would be refused.

The defendant presented the checks himself, at the counter of the bank. They were mere requests to pay to him the amount named in them, couched in the appropriate and only language known there; and addressed to the person whose peculiar province and duty it was to know whether they ought to be paid or not. He complied with the requests, and charged the sums paid, to the defendant, and thus created a contract between the parties. Upon this contract the bank must rely for redress.

This case lacks the elements of the English decisions. And we think it would be an unwise and dangerous construction of the statute, to extend it to transactions like this. This case may come

pretty near the line which divides private frauds from indictable offences; and at first we were in doubt on which side it would fall. But, upon a careful examination, we are well satisfied that it cannot properly be brought within the statute.

*Verdict set aside and new trial granted.*

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### ROBBERY.

*State v. John, 5 Jones Law (N. C.), 163. (1857.)*

INDICTMENT FOR HIGHWAY ROBBERY, tried before MANLY, J., at the last Fall Term of Caswell Superior Court.

The indictment upon which the prisoner was tried, is as follows:

<p>“STATE OF NORTH CAROLINA, Caswell County,</p>	<p>SUPERIOR COURT OF LAW, Fall Term, 1857.</p>
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The jurors for the State, upon their oath present, that John, a negro slave, the property of Samuel Watkins, in the county of Caswell aforesaid, on the nineteenth day of June, in the year of our Lord one thousand eight hundred and fifty seven, with force and arms in the county aforesaid, in the common and public highway of the State, in and upon one Matthew Brooks, then and there being in the peace of God, feloniously did make an assault, and him, the said Matthew Brooks, in bodily fear and danger of his life in the highway aforesaid, then and there did feloniously put, and one pocket-book, containing divers, to wit, ten, bank-notes, for the payment of divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of two hundred and twenty-eight dollars, of the value of two hundred and twenty-eight dollars, of the goods and chattels of the said Matthew Brooks, in the highway aforesaid, then and there feloniously and violently did steal, take and carry away, contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.”

There were two other counts in the bill, of the same tenor and effect, except that the second charged the stealing of the bank-notes alone, and the third the pocket-book alone.

The evidence upon the only point considered by this Court was,

that on the 19th of June last, the prosecutor, Brooks, was in Milton in the county of Caswell, with a wagon and two horses and a portion of his crop of tobacco; that having sold the tobacco and made some purchases, he drove out of the town intending to camp at a cross-road about three miles distant; that at a short distance outside of the limits of the town, at a bridge across a small stream, he stopped to water his horses, and while so engaged, it being then about dark, a negro came over the bridge from the town, and enquired which of the two roads near by he intended to travel; the witness told him, and, thereupon, the negro passed on along the road indicated; that at the same time, another person came over the bridge and took the other road; that the witness soon overtook the negro, and they travelled on together in occasional conversation, the negro walking and the witness sitting in and driving his wagon, until the negro told the witness that he had found a bill of money in the streets of Milton, and he wanted him to look at it, and tell him how much it was; that the witness objected on account of its being dark, but the negro insisted, and, after some further conversation, not material, a torch light was struck from matches with pine wood, and the bill examined; that the amount of the bill excited his suspicions, and he took particular notice of the negro's face, his clothes, &c.; that while the witness was examining the bill, the negro's hand was felt in his pocket upon his pocket-book; that the witness immediately seized his arm, the negro at the same time snatching the bill of money; that a scuffle ensued, in which the witness was thrown out of the wagon under the tongue, and when he arose the negro was running off, having taken the pocket-book from his pocket, and also the bill of money they were examining; that the pocket-book contained four fifty-dollar bills, a ten, several fives and a two, making in all two hundred and twenty-seven dollars; that the struggle occurred at a point in the public road about a mile from Milton, at about nine o'clock; that the negro in question, was a large and powerful-looking man. He also testified that the prisoner was the negro of whom he had spoken.

The case below turned chiefly upon the identity of the prisoner with the assailant described by the witness; and many exceptions were taken by the prisoner to the ruling upon questions as to the evidence offered by the State, and to the charge of his Honor, but as the consideration of this Court is entirely confined to the suf-

iciency of the facts to constitute the crime charged, it is not deemed essential to state more of the record sent to this Court.

The prisoner was convicted, and, sentence of death having been pronounced by the Court, he appealed.

PEARSON, J.:

Robbery is committed by force; larceny by stealth. The original cause for making highway robbery a capital felony, without benefit of clergy, was an evil practice, in former days very common, of meeting travellers, and by a display of weapons, or other force, putting them in fear ("stand and deliver"), and in this way taking their goods by force. Hence the indictment (the form is still retained) contains this allegation: "and him (the person robbed) in bodily fear and danger of his life, in the highway, then and there, did feloniously put," and it was for a long time held that the allegation must be proved.

In Foster's Criminal Law, page 128, is this passage: "The prisoner's counsel say there can be no robbery without the circumstance of putting in fear. I think the want of that circumstance alone ought not to be regarded. I am not clear that that circumstance is, of necessity, to be laid in the indictment so as the fact be charged to be done *nolenter et contra voluntatem*. I know there are opinions in the books which seem to make the circumstance of fear necessary, but I have seen a good MS. note of an opinion of Lord HOLT to the contrary, and I am very clear that the circumstance of actual fear at the time of the robbery, need not be strictly proved. Suppose the true man is knocked down without any previous warning to awaken his fears, and lieth totally insensible while the thief riflETH his pockets, is not this robbery? And yet where is the circumstance of actual fear? Or suppose the true man maketh a manful resistance, but is overpowered, and his property taken from him by the mere dint of superior strength, this, doubtless, is robbery. In cases where the true man delivereth his purse without resistance, if the fact be attended with those circumstances of violence and terror which, in common experience, are likely to induce a man to part with his property for the sake of his person, that will amount to a robbery. If fear be a necessary ingredient, the law *in odium spoliatoris* will presume fear, where there appeareth to be so just a ground for it."

In Foster's day it would not have occurred to any lawyer, that

the facts set out in the record, now under consideration, made a case of highway robbery. There was no violence—no circumstance of terror resorted to for the purpose of inducing the prosecutor to part with his property for the sake of his person.

Violence may be used for four purposes: 1st. To prevent resistance. 2nd. To overpower the party. 3rd. To obtain possession of the property. 4th. To effect an escape. Either of the first two, makes the offence robbery. The last, I presume it will be conceded, does not. The third is a middle ground. In general it does not make the offence robbery, but sometimes, according to some of the cases, it does. It is necessary, therefore, to see how the authorities stand in respect to it.

After Foster's day, the idea of robbery was extended so as to take in a case of snatching a thing out of a person's hand and making off with it, without further violence; but in Plunket's case, tried before BULLER, J., and THOMPSON, B., it was held, that snatching an umbrella out of a lady's hand as she was walking the street, was not robbery; and the court say, "It had been ruled about eighty years ago, by very high authority, that the snatching any thing from a person, unawares, constituted robbery; but the law was now settled, that unless there was some struggle to keep it, and it were forced from the hand of the owner, it was not so. This species of larceny seemed to form a middle case between stealing privately from the person, and taking by force and violence;" 2 East's P. C. 703. In Lapier's case, an ear-ring was so suddenly pulled from a lady's ear that she had no time for resisting, yet being done with such violence as to *injure her person*, the blood being drawn from her ear, which was otherwise much hurt, it was held to be robbery; 2 East's P. C. 708. So in Moore's case, 1 Leach, 335: A diamond pin, which a lady had strongly fastened in her hair with a *corkscrew twist*, was snatched with so much force as to tear out a lock of hair, it was held robbery because of the *injury to the person*. Possibly the ground on which these two cases is put may be questioned, as the injury to the person was accidental, and seems not to have been contemplated, but they have no bearing on our case.

In Davies' case the prisoner took hold of a gentleman's sword, who, perceiving it, laid hold of it at the same time, and struggled for it. This was adjudged to be robbery; 2 East's P. C. 709.

In Mason's case, 2 Russ. and Ry. 419 (in 1820), the prisoner

took a watch out of a gentleman's pocket, but it was fastened to a *steel chain* which was around his neck; the prisoner made two or three jerks until he succeeded in breaking the chain; PARK B. instructed the jury that this was robbery; but doubts being expressed, he referred it to all the Judges, who were unanimous in the opinion that it was robbery, because of the force used to break the chain, which was around the gentleman's neck. This is all the Report says. It is short, and to me unsatisfactory, seeming to go back to the idea of robbery that existed before Plunket's case.

In Gnosil's case, 1 Car. and Payne, 304 (11 E. C. L. Rep. 400, 1824), the prosecutor was going along the street, the prisoner laid hold of his watch-chain, and with considerable force jerked it from his pocket, a *scuffle then ensued*, and the prisoner was secured; GARROW B., "The mere act of taking, being forcible, will not make this offence a highway robbery. To constitute the crime of highway robbery, the force used must be either before, or at the time of, the taking, and must be of such a nature as to show that it was intended to *overpower the party robbed* or *prevent his resisting*, and not merely to get possession of the property stolen. Thus, if a man, walking after a woman in the street were, by violence, to pull her shawl from her shoulders, though he might use considerable force, it would not, in my opinion, be highway robbery; because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property." This decision was four years after Mason's case, and I suppose GARROW was then one of the Judges. According to this case, which is the latest that we have met with, our case is not robbery, even if it be admitted to fall under the third head of violence above enumerated. Our case is clearly distinguishable from Davies' case, for both parties *had hold of the sword and struggled* for it. If Davies had let it go, there would have been no necessity for violence, and his holding on, and struggling for it, could only be imputed to his determination to take it by force. In our case, the prosecutor did *not have hold* of the pocket-book; there was no struggle for it; but he had *hold of the prisoner's arm*. So he could not, by letting go the pocket-book, have avoided the necessity for violence, and the struggle in which the prosecutor fell under the tongue of the wagon, is fairly imputable to an effort on the part of the prisoner to get loose from his grasp and make his escape. The only difference between this case and that of

Gnosil, is, that the one succeeded in getting loose and the other was less fortunate. Suppose, in the struggle, the prosecutor had been too strong for the prisoner, and had succeeded in arresting him, there was a taking of the pocket-book and an *asportavit*, so as to constitute larceny in "picking of the pocket," but would any one have said it amounted to robbery? Can the nature of the offence be changed by the accident, that the prisoner succeeded in getting away, because the prosecutor happened to fall on the tongue and double tree, which broke his hold from the arm of the prisoner?

Our case is also clearly distinguishable from Mason's case. The watch was fastened to a *steel chain*, which was *around the neck of the prosecutor*. Had Mason let the watch go, there would have been no necessity for violence; his *holding on* and *jerking until* he broke the chain, could only be imputed to a determination to take the watch by force.

Trexler's case, 2 Car. Law Repos. 90, was also cited in the argument. That was an indictment for forcible trespass. The defendant had taken a bank-note out of the pocket-book of the prosecutor, who tried to get it away from him. He resisted and a struggle ensued. SEAWELL, J., *arguendo*, expresses the opinion that the evidence showed force enough to constitute robbery, although the prosecutor did not have hold of the bank-note. This, I suppose, was said to meet what BULLER says in Plunkett's case, "unless there was some struggle to keep it, and it were forced from the *hand of the owner*." However that may be, it is sufficient to say that was a mere *dictum*. It is true, Judge SEAWELL was greatly distinguished as a criminal lawyer, but a *dictum* in reference to a capital offence, cannot be much relied on when thrown out in considering a misdemeanor.

After much consideration, I am convinced that the facts set out in this record, do not constitute highway robbery. I am, therefore, of opinion that the judgment ought to be reversed, and a *venire de novo* awarded.

BATTLE, J.:

My associate, Judge Pearson, thinks that the facts stated in the prisoner's bill of exceptions, do not constitute a case of robbery, but of larceny only. After an examination of all the authorities upon the subject, which I have been able to find, and much reflec-



tion upon the principles they seem to establish, I am constrained to say that I do not entirely agree with him. I feel, however, that I ought not to permit my dissent to go so far as to prevent my agreeing that the prisoner shall have a new trial. The absence of the Chief Justice, caused by severe sickness, leaves but two members on the bench, and my refusal to concur in reversing the judgment and having a *venire de novo* awarded, would have the effect to keep the prisoner in jail six months longer, which I am unwilling to do. Another reason influences me to adopt the course which I am pursuing, which is, that the attention of the Court and counsel were so much taken up on the trial with the main defense of the prisoner, to wit, the alleged defect in the proof of his identity, that the minute circumstances attending the taking of the prosecutor's pocket-book, do not appear to have been brought out with that fullness and particularity, as to make us sure that we have the true character of the transaction before us. That of course can and will be done on the next trial.

I will now content myself with a brief statement of the reasons which incline me to the opinion that, upon the facts and circumstances as they now appear upon the record, the prisoner is guilty of robbery.

All the more recent writers on criminal law concur, with singular unanimity, in defining what is the kind of taking with violence which is necessary to constitute robbery. Sir William Russell says, that "the rule appears to be well-established, that no sudden taking or snatching of property from a person unawares, is sufficient to constitute robbery, unless some injury be done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it." 2 Russ. on Cr. and Mis. 68. In Archbold's C. P. 225, the same language is used. Roscoe's Crim. Ev. 898 (5th Am. from the 3rd Lon. Ed.), says there must "Some injury be done to the person, or some previous struggling for the possession of the property." Mr. Chitty in his 3rd vol. Crim. Law, 804, has it, that "there must be a struggle, or at least a personal outrage." The language of Mr. East, in his 1 P. Cr. 708, is nearly the same with that of Russell, "That there must be some injury to the person or some previous struggle for the possession of the property." In his notes to 4th vol. Bl. Com. 243, Mr. Chitty says, "To constitute a robbery where an actual violence is relied on, and no putting in fear can be expressly

shown, there must be a struggle, or at least a personal outrage." All these able and eminent writers upon the criminal law agree in this, that if there be a struggle for the possession of the property, or a personal outrage, it is robbery, and refer, in support of their position, to the cases, the most, if not all of which are cited and commented upon in the opinion of my brother PEARSON.

Now, it seems to me, that in the case before us, the testimony of the prosecutor, Brooks, shows something very much like a struggle for the pocket-book before the prisoner succeeded in taking it from the pocket of the prosecutor and running off with it. The distinction between a struggle to escape and one to carry off the property, when the prisoner did both, is in my estimation almost too refined for practical use. I admit that the case of *Rex v. Gnosil*, tried before Baron GARROW, is an authority against the position that a mere struggle for the possession of the property, is alone sufficient to make out a case of robbery. I have only to say of that case, that it is but the opinion of a single Judge against the whole current of the previous adjudications; and it is a little singular that it does not seem to have been noticed by any of the text writers, whose works have been published since the decision was made. I am not inclined, therefore, to place much reliance upon it.

Having accomplished my purpose of stating shortly the reasons why I do not altogether concur in the opinion of my associate, I conclude with expressing again my willingness, for the reasons above given, that the prisoner shall have another trial.

PER CURIAM—Let the judgment be reversed, and this opinion certified, to the end that the prisoner may have a new trial.

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#### RECEIVING STOLEN GOODS.

*Murio v. State*, 31 Tex. App. 210. (1892.)

APPEAL from the District Court of Travis. Tried below before Hon. JAMES H. ROBERTSON.

The indictment in this case charged appellant by two separate counts, the first for the theft of 416 pounds of coffee, and the second for receiving and concealing said coffee, knowing it to have been stolen. At his trial he was convicted under the second count

for receiving and concealing said property, and given as his punishment two years confinement in the penitentiary.

The facts are sufficiently stated in the opinion.

SIMKINS, JUDGE:

Defendant was convicted of receiving stolen property of the value of \$20, and sentenced to two years in the penitentiary, from which he appeals.

On the night of March 30, 1892, a freight car loaded with coffee and other products, on the International & Great Northern Railway at Austin, was broken open and about 416 pounds of coffee taken therefrom. On the morning of April 1 a portion of this coffee, 164 pounds, was found in defendant's house, spread on the floor, and covering thrown over it to resemble a bed, and in the corner was a box marked "A. Frank & Co., San Antonio." When the coffee was found, defendant hung his head and said nothing, but that he could not speak English nor the sheriff speak Spanish.

Three witnesses, defendant's wife being one, proved that one Nestoro was indebted to defendant, and told him he had coffee which he had taken on a debt, and he wanted defendant to sell some of it on commission and pay himself, and he delivered the coffee to him for that purpose. That defendant is a Mexican and can not speak English. J. Reed, a wood dealer in Austin, testified to defendant's honesty and industry.

The only rebutting testimony was the witness Nestoro, who denied giving the coffee to defendant; but it was admitted that he was under indictment for the theft of the same goods. There is no question that the coffee found in defendant's possession had been stolen from the freight car on the International & Great Northern Railway. It was sufficiently identified. The only question that demands consideration is the sufficiency of the testimony to sustain the conviction.

Before he received the coffee defendant was informed by Nestoro that he, Nestoro, had taken the coffee in payment for a debt. Under the statute the party receiving the stolen property must know it was stolen (Penal Code, article 743; Wilson's case, 12 Texas Court of Appeals, 481); and guilty knowledge and the receiving of the stolen goods must concur. Arcia's case, 26 Texas Ct. App. 193; Nourse's case, 2 Texas Ct. App. 304. But guilty knowledge can be implied if defendant received the goods under circum-

stances sufficient to satisfy a man of ordinary intelligence and caution that the goods were stolen. *Desty's Crim. Law*, 147a; *Commonwealth v. Firm*, 108 Mass. 466. Conceding that defendant received the goods from the witness Nestoro to sell on commission, yet the fact that when Nestoro proposed to defendant to deliver him the coffee, defendant asked where he got it, strongly suggesting previous acquaintance with Mr. Nestoro alias Sanches (as he is called by defendant's wife and witness), and the further fact, and when Nestoro brings him the coffee, at night, it is unboxed and the packages are arranged in the form of a bed and covered, may have been regarded by the jury as ample proof of guilty knowledge, and we can not say that they are not justified in so finding.

The judgment is affirmed.

*Affirmed.*

Judges all present and concurring.

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#### FORGERY.

*Commonwealth v. Baldwin*, 11 Gray (Mass.), 197. (1858.)

THOMAS, J.:

This is an indictment for the forgery of a promissory note. The indictment alleges that the defendant at Worcester in this county "feloniously did falsely make, forge and counterfeit a certain false, forged and counterfeit promissory note, which false, forged and counterfeit promissory note is of the following tenor, that is to say:

'\$457.88. Worcester, Aug. 21, 1856. Four months after date we promise to pay to the order of Russell Phelps four hundred fifty seven dollars  $\frac{88}{100}$ , payable at Exchange Bank, Boston, value received.

Schouler, Baldwin & Co.'

with intent thereby then and there to injure and defraud said Russell Phelps."

The circumstances under which the note was given are thus stated in the bill of exceptions: Russell Phelps testified that the note was executed and delivered by the defendant to him at the Bay State House in Worcester, on the 21st of August, 1856, for a note of equal amount, which he held, signed by the defendant

in his individual name, and which was overdue; and that in reply to the inquiry who were the members of the firm of Schouler, Baldwin & Co. the defendant said, "Henry W. Baldwin, and William Schouler of Columbus." He further said that no person was represented by the words "& Co." It appeared in evidence that the note signed Schouler, Baldwin & Co. was never negotiated by Russell Phelps. The government offered evidence which tended to prove either that there never had been any partnership between Schouler and Baldwin, the defendant; or, if there ever had been a partnership, that it was dissolved in the month of July, 1856.

The question raised at the trial and discussed here is whether the execution and delivery of the note, under the facts stated, and with intent to defraud, was a forgery.

It would be difficult perhaps by a single definition of the crime of forgery to include all possible cases. Forgery, speaking in general terms, is the false making or material alteration of or addition to a written instrument for the purpose of deceit and fraud. It may be the making of a false writing purporting to be that of another. It may be the alteration in some material particular of a genuine instrument by a change of its words or figures. It may be the addition of some material provision to an instrument otherwise genuine. It may be the appending of a genuine signature of another to an instrument for which it was not intended. The false writing, alleged to have been made, may purport to be the instrument of a person or firm existing, or of a fictitious person or firm. It may be even in the name of the prisoner, if it purports to be, and is desired to be received as the instrument of a third person having the same name.

As a general rule, however, to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact, not having reference to the person by whom the instrument is executed, will not constitute the crime.

An exception is stated to this last rule by Coke, in the Third Institute, 169, where A. made a feoffment to B. of certain land, and afterwards made a feoffment to C. of the same land with an antedate before the feoffment to B. This was certainly making a false instrument in one's own name; making one's own act to appear to have been done at a time when it was not in fact done. We fail to understand on what principle this case can rest. If

the instrument had been executed in the presence of the feoffee and antedated in his presence, it clearly could not have been deemed forgery. Beyond this, as the feoffment took effect, not by the charter of feoffment, but by the livery of seisin—the entry of the feoffor upon the land with the charter and the delivery of the twig or clod in the name of the seisin of all the land contained in the deed—it is not easy to see how the date could be material.

The case of *Mead v. Young*, 4 T. R. 28, is cited as another exception to the rule. A bill of exchange payable to A. came into the hands of a person not the payee, but having the same name with A. This person indorsed it. In an action by the indorsee against the acceptor, the question arose whether it was competent for the defendant to show that the person indorsing the same was not the real payee. It was held competent, on the ground that the indorsement was a forgery, and that no title to the note could be derived through a forgery. In this case of *Mead v. Young*, the party assumed to use the name and power of the payee. The indorsement purported to be used was intended to be taken as that of another person, the real payee.

The writing alleged to be forged in the case at bar was the handwriting of the defendant, known to be such and intended to be received as such. It binds the defendant. Its falsity consists in the implication that he was a partner of Schouler and authorized to bind him by his act. This, though a fraud, is not, we think, a forgery.

Suppose the defendant had said in terms, "I have authority to sign Schouler's name," and then had signed it in the presence of the promisee. He would have obtained the discharge of the former note by a false pretence, a pretence that he had authority to bind Schouler. "It is not," says Sergeant Hawkins, "the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery." 1 Hawk. c. 70, § 5.

If the defendant had written upon the note, "William Schouler by his agent Henry W. Baldwin," the act plainly would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon his signature. He is not deceived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the

presence of the promisee. He knew it was not Schouler's signature. He relied upon the defendant's statement of his authority to bind him as partner in the firm of Schouler, Baldwin & Co. Or if the partnership had in fact before existed but was then dissolved, the effect of the defendant's act was a false representation of its continued existence.

In the case of *Regina v. White*, 1 Denison, 208, the prisoner indorsed a bill of exchange, "per procuration, Thomas Tomlinson, Emanuel White." He had no authority to make the indorsement, but the twelve judges held unanimously that the act was no forgery.

The *nisi prius* case of *Regina v. Rogers*, 8 Car. & P. 629, has some semblance to the case before us. The indictment was for uttering a forged acceptance of a bill of exchange. It was sold and delivered by the defendant as the acceptance of Nicholson & Co. Some evidence was offered that it was accepted by one T. Nicholson in the name of a fictitious firm. The instructions to the jury were perhaps broad enough to include the case at bar, but the jury having found that the acceptance was not written by T. Nicholson, the case went no further. The instructions at *nisi prius* have no force as precedent, and in principle are plainly beyond the line of the settled cases.

The result is that the exceptions must be sustained and a new trial ordered in the common pleas. It will be observed, however, that the grounds on which the exceptions are sustained seem necessarily to dispose of the cause.

*Exceptions sustained.*

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#### UTTERING FORGED PAPER.

*People v. Caton*, 25 Mich. 388. (1872.)

COOLEY, J.:

The prisoner was convicted on an information, charging that he "did utter and publish as true, a certain false, forged and counterfeited instrument and writing for the payment of money, in the likeness and similitude of a mortgage" of lands. It is objected that the information charges no offense, a mortgage not being among the instruments mentioned in the statute under which it is drawn.

The statute (Comp. L., § 5803) provides that, "Every person

who shall utter and publish as true, any false, forged, altered, or counterfeit record, deed, instrument, or other writing mentioned in the preceding section knowing the same to be false," etc., shall be punished, etc.

It is not disputed that a mortgage, in the legal sense, is a deed; but it is insisted that in common parlance a distinction is taken between the two instruments; the term, *deed*, being applied to conveyances of land, which, in this State at least, a mortgage is not. And the argument is, that the word deed has been used in the statute in the sense in which it is commonly used and employed; or, at least, that the rules of strict construction applicable to criminal statutes would require us so to hold.

We are not prepared to yield our assent to this argument. The statute employs a general term which covers instruments given for a great variety of purposes, and it gives no indication of an intent to confine its operation to deeds of lands; much less to that class of deeds of lands which convey the legal title. There is abundant reason to believe, on the other hand, that the word is used in the broad legal sense in which it is understood at the common law; for the purpose of the legislature has evidently been to give, by the use of general words, such an enumeration of the instruments likely to be the subject of forgery as to embrace all the valuable writings, by the false making or altering of which, innocent persons might be in danger of being defrauded. The section preceding the one on which the information is based, and to which it refers, enumerates a public record, certificate, return, or attestation of a public officer, *any* charter, deed, will, testament, bond or writing obligatory, letter of attorney, policy of insurance, bill of lading, or discharge for money or other property, any acceptance of a bill of exchange, or indorsement, or assignment of a bill of exchange or promissory note for the payment of money, any accountable receipt for money, goods, or other property. We can not enlarge a criminal statute by construction; neither, where the evident purpose is, to make it so comprehensive, are we at liberty to restrict it. "*Any deed*" will certainly include a deed of mortgage.

It is also objected that there was no evidence of the uttering and publishing to go to the jury. We think that, on the testimony of Mr. Elwood, the jury would have been warranted in finding that a negotiation for the sale of the mortgage was entered upon with him, and that the forged paper was put into his hands as a



genuine instrument, ready for his acceptance as such, had he been prepared then, on behalf of the bank, to close the transaction. And these facts, if found, we think, would have constituted an uttering.

To constitute an uttering, it is not necessary that the forged instrument should have been actually received as genuine by the party upon whom the attempt to defraud is made. To utter a thing, is to offer it, whether it be taken or not; *Jervis*, Ch. J., *Regina v. Welch*, 2 Den. C. C., 78; S. C., 15 Jur., 136. It is to declare or assert, directly or indirectly, by words or actions, that it is good: *Tilghman*, Ch. J., *Commonwealth v. Searle*, 2 Binn., 339. A receipt may be *uttered* by the mere exhibition of it to one with whom the party is claiming credit for it, though he refuses to part with the possession: *Regina v. Radford*, 1 C. & K., 707. In *People v. Rathbun*, 21 Wend., 528, COWEN, J., says, "not only a sale or paying away a counterfeit note or indorsement, but obtaining credit on it in any form, as by leaving it in pledge: *Rex v. Birkett*, Russ. & R. C. C., 86—or indeed offering it in dealing, though it be refused: *Rex v. Arscott*, 6 C. & P., 408; *Rex v. Shukard*, Russ. & R. C. C., 200; *Rex v. Palmer*, 2 Leach, 978—amount to an uttering and publishing." There are no decisions detracting from the force of these. We do not think it an important circumstance that it may have been contemplated that the board would be consulted by Elwood before closing the negotiation.

None of the other exceptions which were taken, seems to us to require special discussion. There was nothing apparent on the face of the mortgage which would invalidate it, and the rulings of the recorder were manifestly right. It should be certified to him as the opinion of this court that he should proceed to judgment.

The other Justices concurred.

## CHAPTER XII.

### OFFENSES AGAINST PUBLIC JUSTICE.

#### PERJURY.

*State v. Kirkpatrick, 32 Ark. 117. (1877.)*

#### ENGLISH, CH. J.:

Kirkwood was indicted for perjury, in the Circuit Court of Clark County, at the April Term, 1876; the indictment charging in substance:

That "said J. H. Kirkpatrick, at, etc., on the 10th day of January, 1876, did wilfully, corruptly, and falsely swear before R. R. Ross, Deputy Clerk of Jesse A. Ross, Clerk of the Circuit Court of Clark County, he, the said R. R. Ross, being authorized by law to administer oaths; that he had not thereupon had the benefit of an Act of Congress approved May 20th, 1862, entitled 'An Act to secure a homestead to actual settlers on the public domain'; and he, the said J. H. Kirkpatrick, further made oath, that he had made a bona fide settlement and improvement, and was residing on certain lands for the securing of which he, the said J. H. Kirkpatrick, was then and there making application to secure as a homestead, to-wit: The southeast quarter of the southeast quarter of section thirty-three, and the south half of the south-west quarter of section thirty-four, and the southeast quarter of the southeast quarter of section thirty-four, all in township five south, range twenty-two west. Which said oath was material to secure said lands as such homestead; and the said J. H. Kirkpatrick well knew the same was false when he made the same as aforesaid; the truth being, that he had theretofore made an application to homestead certain lands; and that said J. H. Kirkpatrick had made no settlement or improvement, and was not residing on said land above described. And so the jury say, that the said J. H. Kirkpatrick, in the manner above stated, committed perjury, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Arkansas."

The defendant waiving arraignment, entered the plea of not

guilty, and was put upon trial. The State introduced A. M. Crow as a witness, to prove that the defendant had made affidavit of settlement and cultivation before the Clerk of Clark County, in order to secure a homestead under the Laws of the United States; whereupon the defendant moved to exclude such testimony, and the court sustained the motion. The State also offered testimony to prove that defendant had made no settlement and cultivation at the date of said affidavit, which testimony was excluded by the court, on motion of defendant; to each of which rulings the State excepted. The State offering no further evidence, the jury returned a verdict of not guilty, and judgment was entered discharging defendant. The State appealed.

By sec. 2 of the Act of Congress, approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain," (12 U. S. St. L., 392) the person applying for the benefit of the act, is required to make affidavit before the register or receiver, stating the facts prescribed by the act to entitle the applicant to a homestead entry, and to file the affidavit with the register or receiver.

The original act contained no provision for making such affidavit before the clerk of a state court.

But by sec. 3 of the Act of 21st March, 1864, Amendatory of the Homestead Law (13 U. S. St. L., 35) it is provided:

"That in any case hereafter in which the applicant for the benefit of the homestead, and whose family or some member thereof, is residing on the land which he desires to enter, and upon which a bona fide improvement and settlement had been made, is prevented, by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, it shall and may be lawful for him to make the affidavit required by the original statute, before the clerk of the court for the county in which the applicant is an actual resident, and to transmit the same, with the fee and commissions, to the register and receiver."

It was for making a false affidavit under this act, that appellee was indicted for perjury.

Mr. Greenleaf, treating of proof in cases of perjury, says: "where the oath was made to an answer in chancery, deposition, affidavit, or other written paper, signed by the party, the original document should be produced, with proof of his handwriting, etc." 3 Greenleaf: Ev., sec. 192.

In this case the State, it seems, neither offered in evidence the original affidavit, nor a certified copy from the land office, nor made any showing that neither could be produced, but offered a witness to prove the oath. The court below did not err in excluding the evidence so offered.

It is suggested, however, that the court excluded the evidence offered, on the ground that it had no jurisdiction to try and punish the offense charged in the indictment, and the Attorney General has filed the transcript here for the purpose of having that question decided, under sec. 2128, Gantt's Digest.

If the court below was of the opinion that it had no jurisdiction of the offense charged, it should have quashed the indictment of its own motion, no demurrer or motion to quash being interposed by the defendant. It was useless to put him upon trial, on the plea of not guilty, exclude the evidence offered by the State, and permit a verdict of acquittal to be rendered, if the court had no jurisdiction of the offense.

We have however, examined the question of jurisdiction, and have no objection to expressing an opinion on the subject.

The clerk derives his authority to take the affidavit, from the Act of Congress, and not from any statute of the State. Whether a deputy of the clerk can administer the oath, we have no occasion to decide in considering the question of jurisdiction. See *United States v. Barton*, Gilpin's R., 443.

There being no law of the State requiring, or imposing it as a duty upon the clerk to take the affidavit, he being merely authorized to do so by Congress, for the purposes of the Homestead Act, he is at liberty to administer the oath, or decline it, as he may think proper. *State v. Whittemore*, 50 New Hamp., 250; *United State v. Bailey*, 9 Peters, 253.

Perjury is an offense against the sovereign whose law is violated by the making of the false oath.

The courts of no country or sovereign, execute the penal laws of another. Story, on Conf. L., sec. 621; *The Antelope*, 10 Wheaton, 66, 123.

In this country, where the citizens owe allegiance to two sovereigns, the State and Federal governments, there are certain crimes which are offenses against the laws of both sovereigns, and they may be punished in the courts of either. For example, the State has passed statutes to punish the passing of counterfeit coin,

etc., and Congress has enacted similar laws and a person passing or uttering such coin, etc., criminally, may be punished by the proper court of either government. *Fox v. The State of Ohio*, 5 Howard, 411; *United States v. Marigold*, 9 Howard 561.

Another example may be given, in the language of Mr. Justice Grier, in *Moore v. Illinois*, 14 Howard, 20. Where the same act may be an offense against both sovereigns, and punishable by both: "Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for any infraction of the laws of either." The same act may be an offense or transgression of the laws of both. Thus an assault upon the Marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment: and the same act may be also a gross breach of the peace of the State, a riot, assault, or murder, and subject the same person to punishment, under the State laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense: but only that by one act he committed two offenses, for each of which he is justly punishable."

We have no special statute making it perjury to make a false oath before a clerk, who administers such oaths under the authority conferred upon him by, and for the purpose of, the Homestead Act of Congress.

The general statute defines perjury thus:

"Perjury is the wilful and corrupt swearing, testifying or affirming falsely to any material matter in any cause, matter, or proceeding before any court, tribunal, body corporate, or other officer having by law, authority to administer oaths." Gantt's Digest, sec. 1415.

"The wilful and corrupt swearing, affirming, or declaring falsely to any affidavit, deposition, or probate, authorized by law to be taken before any court, tribunal, body politic, or officer, shall be deemed perjury." *Ib.*, sec. 1416.

The oath in this case was not taken under or by virtue of any law of the State, nor by an officer acting, in administering the oath, under authority conferred upon him by any law of the State,

nor was the affidavit to be used in any court, tribunal or before any officer of the State.

On the contrary, the oath was taken under the Homestead Act of Congress, it was administered by an officer acting under authority of that act, and the affidavit was taken to be used before a United States land officer to procure a homestead entry. If the oath was wilfully false, it was an offense not in violation of a State law, nor against the sovereignty of the State. *United States v. Bailey*, 9 Peters, 238.

In *People v. Sweetman*, 3 Parker's Criminal Rep., 358; held that under the Act of Congress, the County Courts of the several counties of the State of New York had jurisdiction of the naturalization of aliens. That the State Courts in entertaining jurisdiction of cases of naturalization, act exclusively under the laws of the United States, and should be deemed *quoad hoc*, courts of the United States. And that wilful false swearing by a person giving material testimony in a naturalization proceeding, before a County Court, was an offense against the laws of the United States, and punishable in the United States Courts.

In *Rump v. Commonwealth*, 30 Penn. State R., 475; held that a person who made a false oath in a naturalization proceeding before the District Court for the City and County of Philadelphia, was indictable in the State Court, but this was put upon the ground that a statute of the State, as well as the Act of Congress, conferred upon the courts of the State jurisdiction to naturalize aliens. This case was approved in a similar case in *New Hampshire State v. Whittemore*, 5 N. H., 246.

But the Pennsylvania case was a stronger one in favor of the jurisdiction of the State Court, than the case now before us. There, the oath was taken in a proceeding in which the State Court was exercising jurisdiction; here, the affidavit was made to be used before a Federal land officer.

In *ex parte Dock Bridges*, 2 Wood's R., 428; Bridges was indicted in the Superior Court of Randolph County, Georgia, for perjury committed October 27th, 1874, in an examination before a United States Commissioner, under the Improvement Act. He was released, after conviction, on *habeas corpus*, by Mr. Justice Bradley, on the ground that the crime with which he was charged was an offense against the laws of the United States, and not against the laws of Georgia. That it would be a manifest incon-

gruity for one sovereignty to punish a person for an offense committed against the laws of another sovereignty.

We are of opinion that the court below had no jurisdiction of the offense charged in the indictment in this case.

Affirmed.

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BRIBERY.

*State v. Ellis, 33 N. J. Law 102. (1868.)*

On motion to quash indictment.

An indictment for bribery was found against the defendant in the Quarter Sessions of Hudson county, charging him with having wickedly and corruptly offered the sum of fifty dollars to a member of the common council of Hudson City, to vote for a certain application to lay a railroad track along one of the public streets of said city.

The case having been removed into this court by *certiorari*, the defendant moved to quash the indictment, on the ground that it set forth no crime.

The opinion of the court was delivered by

DALRIMPLE, J.:

The indictment in this case was removed into this court by *certiorari* to the Sessions of Hudson. It sets forth in substance, in language sufficiently plain and intelligible, that application having been duly made to the common council of Jersey City for leave to lay a railroad track along one of the public streets of that city, the defendant wickedly and corruptly offered to one of the members of said common council the sum of fifty dollars to vote in favor of said application. Upon return of the *certiorari*, a motion was made to quash the indictment, on the ground that the facts set forth do not constitute a crime.

It is said that the common law offence of bribery can only be predicated of a reward given to a judge or other official concerned in the administration of justice. The earlier text writers thus define the offence: "Where any man in judicial place takes any fee or pension, robe or livery, gift, reward or brokerage, of any person, that hath to do before him in any way, for doing his office, or by color of his office, but of the king only, unless it be meat and

drink, and that of small value." 3 Inst. 145. The definition in 4 Blackstone's Com. 139, is to the same effect. Hawkins, in his Pleas of the Crown, Vol 1, p. 312, gives, substantially, the same description of the offence, but adds: "Also, bribery signifies the taking or giving of a reward for offices of a public nature." The later commentators, supported, as I think, by the adjudged cases, however, maintain the broader doctrine, that any attempt to influence an officer in his official conduct, whether in the executive, legislative, or judicial department of the government, by the offer of a reward or pecuniary consideration, is an indictable common law misdemeanor. 3 Greenleaf's Ev., § 71; Bishop on Criminal Law, Vol. 1, § 95, and notes; 1 Russell on Crimes 156. The case of *Rex v. Vaughan*, 4 Burr. 2494, arose upon motion for an information for a misdemeanor against the defendant, for offering money to the Duke of Grafton, First Lord of the Treasury, to procure the defendant's appointment by the Crown to an office. Lord Mansfield, in his opinion in that case says: "If these transactions are believed to be frequent, it is time to put a stop to them. A minister, trusted by the King to recommend fit persons to offices, would betray that trust, and disappoint that confidence, if he should secretly take a bribe for that recommendation." The motion was granted. In the case of *Rex v. Plympton*, 2 Lord Raymond 1377, the court held that it was an offence to bribe persons to vote at elections of members of a corporation. Many other cases might be cited in support of the general proposition laid down by the later text writers above referred to. The cases will, however, all be found collated in 2d Bishop's Criminal Law, in the notes to §§ 76 and 77. Indeed, the authorities seem to be all one way. Neither upon principle nor authority can the crime of bribery be confined to acts done to corrupt officers concerned in the administration of justice. If in the case now before us, it was no crime for the defendant to offer, it would have been no crime for the councilman to accept the bribe. The result would, therefore, be that votes of members of council on all questions coming before them, could be bought and sold like merchandise in the market. The law is otherwise. The common law offence of bribery is indictable and punishable in this state. Our statutes against bribery merely define and fix the punishment for the offence, in cases of bribery of judicial officers and members of the legislature; they do not repeal or abrogate, or otherwise alter the common law.



It is contended, in the next place, that the facts set forth in the indictment constitute no offence, inasmuch as the common council had not jurisdiction to grant the application for which the vote was sought to be bought. In my opinion, it is entirely immaterial whether council had or had not jurisdiction over the subject matter of the application. If the application was, in point of fact, made, an attempt to procure votes for it by bribery was criminal. The offence is complete when an offer of reward is made to influence the vote or action of the official. It need not be averred, that the vote, if procured, would have produced the desired result, nor that the official, or the body of which he was a member, had authority by law to do the thing sought to be accomplished. Suppose an application made to a justice of the peace, in the court for the trial of small causes, for a summons in case of replevin, for slander, assault and battery, or trespass, wherein title to lands is involved; over these actions a justice of the peace has no jurisdiction, and any judgment he might render therein, would be *coram non iudice* and void; yet, I think, it can hardly be contended, that a justice thus applied to may be offered, and with impunity accept a reward, to issue a summons in any case without his jurisdiction. If the common council of Jersey City had not authority to grant the application referred to, the act of the defendant in endeavoring to procure the grant asked for was only the more criminal, because he sought, by the corrupt use of money, to purchase from council an easement which they had no authority to grant. He thereby endeavored to induce them to step beyond the line of their duty, and usurp authority not committed to them. The gist of the offence is said to be the tendency of the bribe to pervert justice in any of the governmental departments, executive, legislative, or judicial. 2 Bishop's Criminal Law, § 96. Would it not be a plain perversion of justice, to buy the votes of councilmen in favor of a surrender of the streets of the city, for the purposes of a railroad, when such surrender is unauthorized by law? The rights of the citizens of the municipality thus corruptly tampered with and bargained away, might be regained after a long and expensive litigation, or in some other mode; nevertheless, bribery and corruption would have done, to some extent at least, their work, and the due course of justice have been disturbed. But I am not prepared to assent, as at present advised, to the proposition that the common council could not properly entertain the

application. They were asked by a chartered railroad company of this state, having its terminus in Jersey City, to consent that a railroad track might be laid along one of the public streets of that city. It is not pretended that any legislative authority to lay such track had been obtained. The railroad company could not, under these circumstances, lawfully appropriate to its use one of the public streets of the city without the consent of the city, which has full control over all public streets within the city limits. Laws of 1851, p. 406, § 6.

Whether or not the common council has the power, with or without legislative sanction, to grant the use of a public street to a railroad company for the uses of the railroad, it is, I think, clear that no such use can be made of the streets, without the consent of the city, in the absence of a legislative grant to that effect.

Nor is it material whether the railroad company which applied for the privilege, had the power under its charter to lay the track. Application had been duly made for that purpose, and was pending. An attempt to bribe a member of council to vote upon it, whether such attempt was made after or before the introduction of an ordinance or resolution granting the privilege asked, comes within the general law against bribery. Whether the common council had authority to make the grant, or the railroad company the power to avail itself of its benefits, if made, or whether the offer of a bribe was before or after the application in due course of proceeding, had been embodied in an ordinance or resolution is immaterial. The offer of anything of value in corrupt payment or reward for any official act, legislative, executive, or judicial, to be done, is an indictable offence at the common law.

The objections taken are not tenable, and the motion to quash must be denied. Motion denied.

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#### COMPOUNDING CRIME.

*State v. Carver, 69 N. H. 216. (1897.)*

INDICTMENT, charging that the defendant, on the second day of September, 1897, at, etc., "with force and arms, under color and pretence that one Frank E. Fernald had committed an offence against the statutes of this state relating to the sale of spirituous liquors, in this, that the said Frank E. Fernald had before that time,

to wit, on the twenty-ninth day of March, eighteen hundred and ninety-seven, not being an agent of any town for the purpose of selling spirit, sold to one whose name he would not reveal, one quart of spirituous liquor, contrary to the form of the statutes in such case made and provided, unlawfully and for the sake of wicked gain, and without the order and consent of the attorney-general of said state, did make composition with the said Frank E. Fernald, and exact and take of him the sum of thirty dollars for forbearing to prosecute for said supposed offence, to the great hindrance of public justice, and against the peace and dignity of the state." Verdict, guilty.

The defendant moved to quash the indictment because it described the offence for which he made composition with said Fernald as a "supposed" offence. The motion was overruled, and the defendant excepted.

It appeared from the evidence for the state that on August 31, 1897, the defendant went to Fernald and informed him that he had a case against him for the illegal sale of liquor; that the defendant read the law to Fernald and told him if he would settle it would save him a good many dollars; that for thirty dollars he would destroy the evidence, which was a bottle of liquor; that he would prosecute unless thirty dollars was paid, and the fine would be fifty dollars and the costs twenty-five dollars; that subsequently Fernald paid him thirty dollars as demanded, and that thereupon the defendant turned the liquor into the sink, gave Fernald the bottle, and wrote and delivered to him a paper as follows: "Milton, N. H., Sept. 2, 1897. This is to certify that I promise to withdraw all further action against Frank E. Fernald for illegal sale of liquor March 29, 1897. F. E. Carver."

The defendant offered no evidence. His counsel admitted the facts to be substantially as claimed by the state, and said the defence was that the defendant had no intention of violating the law. The court ruled that if the defendant knew what he was doing and did what he intended to do, it was immaterial what his opinion was as to the legal effect of what he was doing, and it would be no defence that he did not know he was violating the law. To this ruling the defendant excepted.

BLODGETT, J.:

Whatever diversity of opinion there may justly be as to the

policy of the liquor laws of this state, it cannot be doubted that their violation is a grave misdemeanor against public justice, nor that its compromise with the offender by a private individual is both pernicious and illegal.

"Misdemeanors are either *mala in se*, or penal at common law, and such as are *mala prohibita*, or penal by statute. Those *mala in se* are such as mischievously affect the person or property of another, or outrage decency, disturb the peace, injure public morals, or are breaches of public duty." 4 Am. & Eng. Enc. Law, 654.

There being in this state no statute prohibiting the composition of misdemeanors, and the body of the common law and the English statutes in amendment of it, so far as they were applicable to our institutions and the circumstances of the country, having been in force here upon the organization of the provincial government and continued in force by the constitution, so far as they are not repugnant to that instrument, until altered or repealed by the legislature (*State v. Rollins*, 8 N. H. 550; *State v. Albee*, 61 N. H. 427), the first inquiry is whether such composition was an indictable offence at common law.

While decisions upon this precise point are lacking, the language of the books is general that the taking of money or other reward to suppress a criminal prosecution, or the evidence necessary to support it, was an indictable offence at common law; and although the English cases may not all be reconcilable with this view, it would seem that when the offence compounded was one against public justice and dangerous to society it was indictable, while those having largely the nature of private injuries, or of very low grade, were not indictable. See *Johnson v. Ogilby*, 3 P. Wms. 277; *Fallows v. Taylor*, 7 T. R. 475; *Collins v. Blantern*, 2 Wils. 341, 348, 349; *Rex v. Stone*, 4 C. & P. 379; *Keir v. Leeman*, 6 Q. B. 308, 316-322,—S. C., on error 9 Q. B. 371, 395; *Rex v. Crisp*, 1 B. & Ald. 282; *Edgcombe v. Rodd*, 5 East 294, 303; *Rex v. Southerton*, 6 East 126; *Beeley v. Wingfield*, 11 East 46, 48; *Baker v. Townsend*, 7 Taun. 422, 426; *Bushel v. Barrett*, Ry. & M. 434; *Rex v. Lawley*, 2 Stra. 904; Steph. Cr. L. \*67; 3 Wat. Arch. Crim. Pr. & Pl. 623-10, 623-11; 1 Russ. Cr. 136; 1 Ch. Cr. L. (3d Am. ed.) 4; 1 Bish. Cr. L. (7th ed.), ss. 710, 711; Dest. Cr. L. s. 10 b; 4 Wend. Bl. Com. 136, and note 18.

In this restricted sense, we are of opinion that the taking of money, or other reward or promise of reward, to forbear or stifle

a criminal prosecution for a misdemeanor, was an indictable offence by the common law, the same as it unquestionably was for a felony (*Partridge v. Hood*, 120 Mass. 403, 405, 406, 407), and that it has always been so understood and received here, as well as in other jurisdictions. *Plumer v. Smith*, 5 N. H. 553, 554; *Hinds v. Chamberlin*, 6 N. H. 229; *Severance v. Kimball*, 8 N. H. 386, 387; *Hinesburgh v. Sumner*, 9 Vt. 23, 26; *Badger v. Williams*, 1 D. Chip. 137, 138, 139; *State v. Keyes*, 8 Vt. 57, 65-67; *State v. Carpenter*, 20 Vt. 9; *Commonwealth v. Pease*, 16 Mass. 91; *Jones v. Rice*, 18 Pick. 440; *Partridge v. Hood*, *supra*; *State v. Dowd*, 7 Conn. 384, 386.

Certainly, there is no ground to contend that the offence is any less pernicious and reprehensible under our form of government than under that of the mother country, or that, as a part of the body of the common law, it was inapplicable to our institutions and circumstances at the time of the organization of our provincial government, or in any manner repugnant to the constitution or to our present institutions and circumstances. Indeed, the absence of any statute upon the subject of the composition of misdemeanors sufficiently shows the general understanding in this state, for it cannot reasonably be supposed that so infamous an offence would have been permitted to go unpunished for want of statutory enactment unless it had been understood generally that under our common law none was necessary.

But not only did the defendant, in consideration of a reward, compound a public misdemeanor, and suppress and destroy the material evidence necessary to support it, he also defrauded the revenue by depriving the public of that portion of the pecuniary penalty to which they are entitled for a violation of the liquor laws; and this of itself is a sufficient ground on which to sustain an indictment at common law. *Rex v. Southerton*, 6 East 126; 1 Russ. Cr. \*134.

In view of these conclusions, it is unnecessary to examine the question argued by counsel as to whether or not the case falls within the statute of 18 Eliz., c. 5 (made perpetual by 27 Eliz., c. 10, and amended as to punishment by 56 Geo. III, c. 138), by which it was enacted that if any person "by color or pretence of process, or without process upon color or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward," without the order or

consent of some court, "he shall stand two hours in the pillory, be forever disabled to sue on any popular or penal statute, and shall forfeit ten pounds."

The motion to quash the indictment because it describes the offence for which composition was made as a "supposed offence," was properly denied. "The bargain and acceptance of the reward makes the crime" (*State v. Duhammel*, 2 Harr. 532, 533); and in such a case, "the party may be convicted though no offence liable to a penalty has been committed by the person from whom the reward is taken." *Reg. v. Best*, 9 C. & P. 368,—38 Eng. C. L. 220; *Rex v. Gotley*, Russ. & Ry. 84; *People v. Buckland*, 13 Wend. 592; 1 Russ. Cr. \*133, 134; 3 Arch. Crim. Pr. & Pl. 623-11.

The ruling that "if the defendant knew what he was doing and did what he intended to do, it was immaterial what his opinion was as to the legal effect of what he was doing, and it would be no defence that he did not know he was violating the law," was manifestly correct. "A man's moral perceptions may be so perverted as to imagine an act to be right and legal which the law justly pronounces fraudulent and corrupt; but he is not therefore to escape from the consequences of it." Bump Fr. Conv. (3d ed.) 25. "Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law" (*Reynolds v. United States*, 98 U. S. 145); and "in no case can one enter a court of justice to which he has been summoned in either a civil or criminal proceeding, with the sole and naked defence that when he did the act complained of, he did not know of the existence of the law which he violated." 1 Bish. Cr. L. (7th ed.), s. 294.

It is elementary, as well as indispensable to the orderly administration of justice, that every man is presumed to know the laws of the country in which he dwells, and also to intend the necessary and legitimate consequences of what he knowingly does. If there are cases in which the application of these presumptions might operate harshly, the admitted facts amply demonstrate that this case is not such an one.

*Exceptions overruled.*

CLARK, J., did not sit: the others concurred

## CHAPTER XIII.

### OFFENCES AGAINST PUBLIC PEACE.

#### AFFRAY.

*Hawkins v. State, 13 Ga. 322. (1853.)*

Affray in Baldwin Superior Court. Tried before Judge JOHNSON, March Term, 1853.

Nathan Hawkins and William G. Bonner were indicted for an affray. The proof on the part of the State was, that Hawkins was in the public street in Milledgeville, when Bonner passed by; Hawkins accosted him, rising at the same time, "I understand you said that you had made a contract with me about feeding your horses. I have said, that if you said so, you told a d—d lie; and as I am not accustomed to say anything behind a man's back which I will not say to his face, I now tell you of it." Bonner replied, "I did not say that I had made a contract with you, but if you mean to say that I told a lie, I will spit in your face." Hawkins said, "you had better try it, it will cost you nothing, God d—n you." Bonner then spit at Hawkins, springing forward and catching him by the collar. Hawkins pushed him off, when Bonner drew his bowie knife and cut at Hawkins. Hawkins then drew his knife from his pocket, but did not use it, being prevented.

Some testimony was introduced on the part of Bonner; Hawkins introducing none.

Counsel for Hawkins insisted that, as he had introduced no testimony, he was entitled to the conclusion of the argument to the Jury. The Court decided that Bonner, his co-defendant, having introduced evidence, the State was entitled to the conclusion, and this decision is assigned as error.

Counsel for Hawkins requested the Court to charge, that it was not sufficient to constitute an affray, that the fighting was in a public place—it must be proven that it was to the terror of the citizens; which the Court declined to charge, and error is assigned.

The Jury having found defendants guilty, counsel for Hawkins moved for a new trial, on the ground that there was no evidence.

of any assault and battery on the part of Hawkins. The Court refused the motion, and this is assigned as error.

*By the Court.*—WARNER, J., delivering the opinion.

The defendants were indicted for an affray, which is defined by our Code, to be “the fighting of two or more persons in some public place, to the terror of the citizens, and disturbance of the public tranquility.” Prince, 643.

(1.) The defendants are to be tried together, and for the purposes of the trial, and in making their defence, are to be considered as having one common interest; and this view of the question disposes of the objections made to the refusal of the Court to allow each defendant to strike seven of the Jurors peremptorily, and refusing to allow the counsel for one of the defendants to conclude the argument to the Jury, the other defendant having introduced evidence in his behalf to the Jury.

Where two are indicted for an affray, the successful defence of one will operate as an acquittal of both; as where the evidence shows that one of the parties acted entirely in self-defence, while the other assaulted and beat him, the aggressor may be guilty of an assault and battery, but neither of them guilty of an affray; and neither can be convicted on an indictment therefor; so that on the trial of an indictment for an affray, the aggressor is as much interested to show that both parties did not fight, as the innocent party is to show that fact; the defence of one enures to the benefit of the other.

(2.) But it is said, there is no evidence that Hawkins, one of the defendants, fought at all, and that an affray cannot be committed by *words* alone. The evidence is, that an altercation took place between the parties in a public street in Milledgeville, at the instance of Hawkins, who first accosted Bonner. Bonner then drew his knife, cut at Hawkins. Hawkins then drew his knife from his pocket, but did not use it, being prevented by the bystanders. The drawing his knife and attempting to use it on that occasion, was an *act* quite significant of his *intention*, had he not been prevented from using it. The words alone of the parties, independent of their acts, would not have constituted an affray; but their words, accompanied by their acts respectively, in drawing their knives and attempting to use them, was calculated to terrify the good citizens of Milledgeville, and disturb the public tranquility. 1 Russell on Crimes, 271.



(3.) One who aids, assists, and abets an affray, is guilty as principal. *Carlin v. The State*, 4 Yerger's R. 143. The Court instructed the Jury in the language of the Code, in relation to the offence, and they have found, by their verdict, both defendants guilty; and we cannot hold, from the facts apparent on the face of this record, that their verdict was without evidence, as to all the necessary elements to constitute the offence of an affray.

Let the judgment of the Court below be affirmed.

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*Bankus v. State*, 4 Ind. 114. (1853.)

Error to the Henry Circuit Court.

PERKINS, J.:

Indictment for a riot. Jury trial, conviction, motion for a new trial overruled, and judgment against the defendants.

The bill of exceptions in the case states the substance of the evidence given as follows: "Jesse Bankus, Lewis Simpson, William Woods, and William McShirely, four of the defendants, were on trial, and three witnesses were examined on the part of the state (one of whom was engaged in the alleged riot with the defendants), whose testimony tended to prove that on a certain evening, within a year before the finding of said indictment, at the county of Henry, the above-named defendants were at a certain place in said county, called Chicago (there being no evidence to prove that they had assembled at said place by previous concert or arrangement, for any purpose whatever, except the facts that they were all present without any known business, and that they lived in different parts of the neighborhood); that there had been an infair at the house of one Jacob Wise, in said Chicago, whose house was situated on or near the public highway; that the defendants, with one exception, were young men, one of whom went to a neighboring house and borrowed a horn, with which they marched back and forth along the highway, sometimes blowing said horn and singing songs, but not vulgar ones, before the house of said Wise, and north and south of it, and hallooed so that they could be heard near a mile distant, as certain persons, not witnesses, had informed said Wise; and that they continued on the ground, thus acting, till one or two o'clock in the morning. But

said witnesses all concurred in stating that the defendants were all in good humor, and used no violence further than above set forth; that they had no guns or weapons of any kind, made no threats or attempts at force of any kind; that the witnesses were not in the least alarmed, and feared no danger of any kind, and were in no way disturbed, except that Jacob Wise stated that he went to bed about nine o'clock, and was awakened occasionally by the hallooing in the road, and that a pedler, who put up at the house of said Wise that night (it being a public house), inquired if there were a lock and key to the stable in which his horses were kept; and that said Wise, at the instance of said pedler, locked the stable;" which was all the testimony given in the cause.

The question is, whether, upon the foregoing evidence, the jury were authorized to find the defendants guilty of a riot.

The R. S. of 1843, enact, p. 973, that "if three or more persons shall actually do an unlawful act of violence, either with or without a common cause or quarrel, or even do a lawful act in a violent and tumultuous manner, they shall be deemed guilty of a riot." The R. S. of 1852, vol. 2, p. 425, thus define a riot: "If three or more persons shall do an act in a violent and tumultuous manner, they shall be deemed guilty of a riot."

A great noise in the night-time, made by the human voice or by blowing a trumpet, is a nuisance to those near whom it is made. The making of such a noise, therefore, in the vicinity of inhabitants, is an unlawful act; and, if made by three or more persons in concert, is, by the statute of 1843, a riot. All these facts exist in the present case. Here was a great noise, heard a mile, in the night-time, made with human voices and a trumpet, in the vicinity of inhabitants. The requirements of the statute for the making out of the offence are filled. The noise was also made tumultuously. The act itself involves tumultuousness of manner in its performance. But it is said, here was no alarm or fear. The statute defining the offence says nothing about alarm or fear. In this case, however, it was only the witnesses who were not alarmed. Others within the distance of the mile in which the noise was heard, and who were not present to observe the actual condition of things, may have been, and doubtless were, alarmed; and the pedler was afraid his horses would be stolen.

It is said the rioters were in good humor. Very likely, as they were permitted to carry on their operations without interruption.

But with what motive were they performing these good-humored acts? Not, certainly, for the gratification of Wise and his family. They were giving them what is called a charivari, which Webster defines and explains as follows: "A mock serenade of discordant music, kettles, tin-pans, &c., designed to annoy and insult. It was at first directed against widows who married a second time, at an advanced age, but is now extended to other occasions of nocturnal annoyance and insult."

Again, it is urged that these defendants were but acting in accordance with the custom of the country. But a custom of violating the criminal laws will not exempt such violation from punishment. In the case of *The State of Pennsylvania v. Lewis, et al.*, Add. R. 219, it appeared that on the 5th of November, 1795, there was a wedding at the house of one John Weston. The defendants in said case were there without invitation, were civilly treated, and, in the evening, when dancing commenced, began a disturbance in which, during the evening, Weston was so seriously injured that, on the third day after, he died. On the trial of the indictment against said defendants, Campbell, Pentecost, and Brackenridge, in their argument, said, "These men did nothing more than an usual frolic, according to the custom and manners of this country. There was no intention of hurt, no design of mischief, in which the malice, which is a necessary ingredient of murder, consists." But the argument did not prevail; and the Court said, "If appearance of sport will exclude the presumption of malice, sport will always be affected to cover a crime." The defendants were convicted of murder in the second degree.

The case before us we regard as a plain, but not an aggravated one, of riot, and the judgment below must be affirmed. The defendants were fined but 3 dollars each.

*Per Curiam.*—The judgment is affirmed with costs.

## CONSPIRACY.

*State v. Burnham, 15 N. H. 396. (1844.)*

GILCHRIST, J.:

The allegations in the indictment in relation to which the questions arise, are that the respondents conspired to induce sundry persons, by issuing to them fraudulent policies of insurance, to appear at the annual meeting of the company, and vote for directors without right

The first exception is, because the policies were legal and valid, and binding on both parties.

From the second and third exceptions we understand the court to have instructed the jury that the approval of the policies in regular form by the directors, if the design of the respondents were to impose upon the directors in procuring the policies, would not be conclusive evidence in favor of the respondents; that if the jury believed the respondents intended that the policies should be treated as mere nullities, for every purpose but that of enabling the holders to vote, the charge would be sustained, though the respondents agreed that the policies should be duly approved, and the directors were not cognizant of any fraud, and though the policies might be binding upon the parties.

The fourth exception is, that the conspiracy, if any existed, was to procure policies to be issued by the proper officers, and not to cause them to be issued by the respondents.

An examination of all the cases on the subject of conspiracy would be a work of considerable labor, although, excepting for that reason, the subject is not one of much intrinsic difficulty. General definitions of the offence are given in numerous cases, and they are sufficiently precise to enable us to apply the law to the case now before us.

In the first place, we have no doubt that a conspiracy is an indictable offence in this State. It is punishable at common law, its punishment is not repugnant to our institutions, and it is an offence productive of as much injury, and as deserving reprehension under one form of government as another. The case of the *State v. Rollins*, 8 N. H. Rep. 550, settles that the body of the

common law, and the English statutes in amendment of it, so far as they were applicable to our institutions and the circumstances of the country, were in force here upon the organization of the provincial government, and have been continued in force by the Constitution, so far as they are not repugnant to that instrument, until altered or repealed by the legislature.

Combinations against law or against individuals are always dangerous to the public peace and to public security. To guard against the union of individuals to effect an unlawful design, is not easy, and to detect and punish them is often extremely difficult. The unlawful confederacy is, therefore, punished to prevent any act in execution of it. This principle is the foundation of the adjudged cases upon this subject. But the law by no means intends to exclude society from the benefits of united effort for legitimate purposes, and such as promote the well being of individuals or of the public. It uses the word *conspiracy* in its bad sense. An act may be immoral without being indictable, where the isolated acts of an individual are not so injurious to society as to require the intervention of the law. But when immoral acts are committed by numbers, in furtherance of a common object, and with the advantages and strength which determination and union impart to them, they assume the grave importance of a conspiracy, and the peace and order of society require their repression. The existence, therefore, and execution of the law against conspiracies may, in certain contingencies, be as important as the enforcement of any other law for the punishment of offences, and it requires but little argument to demonstrate that such a law may be necessary under any system of government.

We do not propose to go any farther than this case requires, in defining the offence of conspiracy. From its nature, no comprehensive rule can be laid down which shall include all instances of it, and we must rest, therefore, on the individual cases decided, which depend generally on particular circumstances. 3 Ch. Cr. Law 1140. But the authorities agree in stating that a conspiracy is a confederacy to do an unlawful act, or a lawful act by unlawful means, whether to the prejudice of an individual, or of the public, and that it is not necessary that its object should be the commission of a crime. Hawk., B. 1, ch. 72; 3 Ch. Cr. Law 1139; 2 Russ. on Cr. 1800; Archb. Cr. Pl. 390; *Commonwealth v. Judd*, 2 Mass. 329; *Commonwealth v. Hunt*, 4

Met. 111. The same definition is given by Mr. Senator Stebbins, in the case of *Lambert v. The People*, 9 Cowen 578, whose opinion contains a very full and able exposition of the authorities. And he pointedly remarks that the offence is one which with some propriety may be said to consist in an artful combination and contrivance to produce the injuries consequent upon other crimes, in a manner calculated to elude the provisions and restraints of criminal law.

Whether this indictment charges the respondents with a conspiracy to do an unlawful act, is a question which does not arise, and has not been made upon the argument. We assume, therefore, that the ultimate object which the respondents had in view was not illegal. Their purpose was to procure the election of certain persons as directors of the company, and thereby to cause themselves to be employed in the service of the company; and this end, pursued in a legitimate and open manner, and without deceiving or attempting to deceive and defraud those who had the power and right to employ them, or to aid them in their purposes, was as unobjectionable as any pursuit whatever. But if, by an insatiate appetite for gain, the respondents kept exclusively in view the object to be accomplished, lost sight of honesty and fairness in the means used to effect it, and resorted to fraud and falsehood, in such case they have made themselves amenable to the law.

Assuming, then, that the purpose of the respondents was lawful, still, if the means used to effect it be unlawful, the offence will be complete. The illegality of the means in such case must be explained by proper statements, and established by proof. 2 Russ. on Crimes 569; *The King v. Seward*, 1 Ad. & E. 706; *The King v. Eccles*, 3 Dougl. 337; Archb. Cr. Pl. 390, 391. The act of marriage is in itself lawful, but a conspiracy to procure it may amount to a crime, by the practice of undue means. Fowler's Case, 3 East P. C. 461; Best's Case, 2 Lord Raym. 1167; Hawk., B. 1, ch. 72, § 3, (n.)

The authorities agree that the gist of the offence is the conspiracy. Best's Case, 2 Lord Raymond 1167; *Vertue v. Lord Clive*, 4 Burr. 2475; *Commonwealth v. Davis*, 9 Mass. 415; *Commonwealth v. Hunt*, 4 Met. 125; Gill's Case, 2 B. & Ald. 204.

When it is said in the books that the means must be unlawful, it is not to be understood that those means must amount to in-

dictable offences, in order to make the offence of conspiracy complete. It will be enough if they are corrupt, dishonest, fraudulent, immoral, and in that sense illegal, and it is in the combination to make use of such practices that the dangers of this offence consist. *State v. Buchanan*, 5 Har. & J. 317. Conspiracies may be indictable where neither the object, if effected, nor the means made use of to accomplish it, would be punishable without the conspiracy. In the case of a conspiracy among journeymen to raise their wages, the object of the conspiracy is lawful, and the means by which the object is to be effected are no otherwise unlawful than as the conspiracy makes them so. *Rex v. Tailors of Cambridge*, 8 Mod. 11. So in the case of conspiracy among the officers of the East India Company, to resign their commissions, the means were lawful, but for the conspiracy. *Vertue v. Lord Clive*, 4 Burr. 2472. In the case of *The King v. Seward*, 1 Ad. & E. 706, which was an indictment for conspiring to cause a male pauper to marry a female pauper, Mr. Justice Taunton says, that "merely persuading an unmarried man and woman in poor circumstances to contract matrimony, is not an offence. If, indeed, it were done by unfair and undue means, it might be unlawful, but that is not stated. There is no averment that the parties were unwilling, or that the marriage was brought about by any fraud, stratagem, or concealment, or by duress or threat." So, raising or lowering the price of the public funds is not in itself criminal, but a conspiracy to raise their price by *false rumors* is indictable. *The King v. De Berenger*, 3 M. & S. 67. And admitting that the offence of conspiracy is one which should be punished, if a combination to do dishonest and immoral acts do not constitute a conspiracy, even although the acts be not indictable or even actionable, in numerous cases justice could not reach the offenders.

But it is not necessary, in the present case, for us to determine whether, if the object be lawful, the offence of conspiracy will be committed if the means used be no otherwise unlawful or immoral than as they are made so by the conspiracy.

The indictment alleges that the respondents conspired to induce persons, by issuing to them fraudulent policies of insurance, to appear at the annual meeting and vote for directors.

It appears from the fact that the respondents were found guilty, under the instructions of the court, stated in the case, that the

fraud was this: the respondents agreed that the policies should be held and treated as mere nullities for every purpose except that of authorizing the holders to vote thereon at the annual meeting.

It is argued that the allegation of the means used is not proved, because the respondents *issued* no policies; that they were issued by the directors, and the respondents merely delivered them. In one sense the respondents did not issue the policies. They did not issue them in the sense in which the word is ordinarily used, when a bank or an insurance company is said to issue its bills or its policies, for they were not a corporation. But the word *issue* means "to send forth, to emit, to send out, to deliver for use," and the respondents, having procured the policies, *issued* them by sending them out and delivering them to the insured. The allegation, therefore, is strictly proved. But the respondents issued the policies, also, by procuring the directors to issue them, who in this matter were their unconscious agents. We do not think, therefore, that this exception is valid.

The respondents, then, issued the policies. These were in form legal, but in substance dishonest, because the purpose for which, and the consideration upon which they were issued, were corrupt. Having a corrupt purpose in view, are they the less criminal because they prostituted the forms of law to enable them to subserve that purpose? Is the fraud on the company any less? The transaction, if known, certainly could have no other than an injurious effect upon the standing of the company with the public. The object of the company was to indemnify the public against the hazards of fire, and a large number of persons had a deep interest in its well being, and the injurious effect of such a combination was of such a kind that common prudence would not enable one to guard himself against it. If the respondents desired to secure the election of certain persons as directors, they might well enough have induced their friends to become members of the company; they might have canvassed for votes; they might have resorted to the ordinary practices of electioneering. They might have used all those arts which the good sense and right feeling of every disinterested man condemn, although the moral sense of the public may not be sufficiently pure to discountenance them. But all this might have been done without an actual fraud, or even with no fraudulent intent. But here there was a gross fraud. By whose votes were the directors to be elected? It was not by



*bona fide* members of the company. It was not by those whose membership was the result of a positive contract to continue for a definite period. It was not by those who intended to take upon themselves certain responsibilities, in consideration of certain benefits to be derived from the company. But the contracts, except for one selfish and specific purpose, were false. In their substance they were wrongful and fraudulent. They were honest only in their form and outward seeming. They were to exist only as blinds to those whose interests depended on their being honest, upon their being any thing but what they were in fact. The choice of directors in such an association is of the last importance. The control they exercise over the property of the company is great. The measures they adopt in conducting the affairs of the company are full of interest to the members. On them the institution depends for the confidence of the public, for the proper disposition of the funds from which losses are to be paid, and for the general integrity and skill with which its business is managed. They should, of course, be elected by those only who have a positive interest in the success of the company. But this combination intended that they should be chosen by persons to whom its interests were immaterial; who took their policies under a fraudulent pretence, and who were brought forward to outvote the unsuspecting members of the association, who were ignorant of this concerted action. Can we say that this was not a fraud on the directors; that it was not a fraud on the other members? Can we say that policies, legal in form, legally binding in fact upon the insured, but which, it was agreed, should not have the validity they imported, were not founded upon a corrupt agreement; were not, in the language of the indictment, *false policies*? We can regard such policies only as most immoral and fraudulent means to accomplish the object of the respondents, and with this view our opinion is that the instructions of the court were correct.

*Judgment on the verdict.*

## FORCIBLE ENTRY AND DETAINER.

*Commonwealth v. Shattuck*, 4 Cush. (Mass.) 141. (1849.)

The defendants were severally indicted in the court of common pleas, the first named for a forcible entry and detainer, and the others for an assault and battery upon the officer by whom the process, on a complaint of forcible entry and detainer in the first case, was served.

The first indictment alleged, that the defendant, "with force and arms, and with a strong hand, unlawfully, forcibly and injuriously did enter into a certain messuage and parcel of land, with the appurtenances, of one John Temple, &c., &c., with a dwelling-house thereon standing, then and there being in the peaceable possession of the said John Temple and that the said Calvin W. Shattuck, then and there, with force, as aforesaid, and with a strong hand, unlawfully, violently, forcibly and injuriously, did expel, amove and put out the said John Temple from the possession of the said premises with the appurtenances; and the said John Temple, so as aforesaid expelled, amoved and put out from the possession of the same, with force and arms, and with a strong hand, unlawfully, violently, forcibly and injuriously has kept out from, &c., and still does keep out, and other wrongs &c., against the peace, &c., and contrary to the form of the statute in such case made and provided."

To this indictment the defendant demurred and the district attorney joined in demurrer. The court overruled the demurrer, and the defendant thereupon appealed to this court.\*

The indictment, in the second entitled cause, contained two counts. The first alleged, that the defendants committed an assault and battery upon one Samuel Potter, a deputy sheriff, while in the due and lawful exercise of the duties of his office, and obstructed, hindered and opposed him therein. The second count charged the defendants with committing an assault and battery upon Potter, not described as an officer, with a flatiron and a billet of wood.

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\*It was understood, that, by the consent of the attorney for the Commonwealth, the defendant should be entitled to a trial on the merits, if the demurrer should be overruled.

On the trial, which was before Byington, J., the district attorney introduced in evidence a warrant issued by a justice of the peace, upon a complaint against the defendants and others, for a forcible entry and detainer of the premises described in the first indictment, which warrant was in the hands of the deputy sheriff Potter for service, at the time of the alleged assault. This evidence was objected to by the defendant, on the ground that the warrant set forth no offence, and, therefore, that the officer was not required or authorized to serve it; but the evidence was admitted by the court, and there being also other evidence in the case, the jury were instructed, that if they should be satisfied, that the defendants committed an assault and battery upon Potter, while he was in the act of executing the warrant, according to the precept thereof, as an officer, and the defendants knew it, but nevertheless hindered and obstructed him, the defendants would be guilty of the offence charged.

The jury returned a verdict of guilty, and the defendants thereupon alleged exceptions.

The cases were argued together.

DEWEY, J.:

The demurrer to this indictment raises the question as to the sufficiency of the allegations it contains to constitute a charge of an indictable offence. The indictment concluding, as it does, with the averment *contra formam statuti*, may be sustained under our decisions as well as under our statute law, if the facts charged constitute an offence either by statute or at the common law, *Commonwealth v. Hoxey*, 16 Mass. 385; Rev. Sts. c. 137, § 14. It is proposed, in the first place and more at large, to consider the point whether an indictment will lie at common law for a forcible entry.

The objection taken to such an indictment is, that the offence charged is a private injury, and one more properly cognizable under the head of civil trespass or private wrong, and not a matter of public concern, or affecting public rights. If it were a mere trespass, the objection must avail as it did in *Rex v. Storr*, 3 Burr. 1698. A merely unlawful entry upon the land of another, with technical force and arms, but accompanied with no acts beyond a simple trespass, is not an indictable offence. It is also undoubtedly true, that the English statutes having provided another

mode of redress, more effectual as to the speedy restitution of the land to the party from whom the same has been forcibly taken, than the proceedings by indictment would be, the former has been the mode of proceeding more usually resorted to in such cases: and the same is true as to the remedies in use, and the usual mode of redress provided in many of the states in this union.

But we apprehend that both before and since the enacting of the various statute provisions in England, the remedies for a forcible entry unlawfully made have been twofold, one by indictment at common law, and the other by proceedings under the statutes. In *Rex v. Bathurst*, Sayer, 225, it was held, that an indictment lies at common law for a forcible entry into a dwelling-house and expelling the occupants. In *Rex v. Bake*, 3 Burr. 1731, Mr. Justice Wilmot says, "Undoubtedly an indictment will lie at common law, for a forcible entry, though the proceedings are generally under the acts of parliament." In *Rex v. Wilson*, 8 T. R. 357, 362, lord Kenyon says, "There is no doubt that the offence of forcible entry is indictable at the common law, though the statute gives other remedies to the parties aggrieved." 3 Chit. Crim. Law, 1131; Rose. Cr. Ev. 374, are also authorities to the same effect.

In this commonwealth, it seems to be assumed, that such an indictment would lie at the common law, in the opinion delivered by Mr. Justice Wilde in the case of *Sampson v. Henry*, 13 Pick. 36. In the report of the commissioners for revising the statute laws, in 1835, in their note to the first section of the one hundred and fourth chapter, in which they proposed a new section, not copied from any former statutes, which was to this effect: "No person shall make entry into lands except in cases where his entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner;" they say they are only introducing into the statutes a rule fully recognized as a part of our common law, and one plainly implied from the provisions of our existing statutes. Harding's Case, 1 Greenl. 22, is to the same point.

This must be so upon sound principles, as the preservation of the public peace requires that the offence should be punished criminally. Individuals are not to assert their claims to real estate, and especially to a dwelling-house, in the actual possession of another, by force and violence, and with a strong hand. The peace of the commonwealth forbids it. This principle does not in any degree interfere with the making of a formal entry upon land, preparatory

to the bringing of an action at law, and which may be necessary to give a legal seizin to the party, but which leaves those in possession undisturbed as to the actual occupation. Nor does it embrace the case of a mere trespass upon land, as to which the civil remedy is alone to be resorted to. To sustain an indictment for a forcible entry, the entry must be accompanied with circumstances tending to excite terror in the owner, and to prevent him from maintaining his right. There must at least be some apparent violence; or some unusual weapons; or the parties attended with an unusual number of people; some menaces, or other acts giving reasonable cause to fear, that the party making the forcible entry will do some bodily hurt to those in possession, if they do not give up the same. It is the existence of such facts and circumstances, connected with the entry, that removes it from the class of cases of civil injury, to be redressed in actions of trespass or other civil proceedings, and holds the party thus making an unlawful entry amenable to the public as for a public wrong.

Does the present indictment charge such an offence, as we have above described as that of a forcible entry? Charging the entry to have been unlawfully made with force and arms, and with a strong hand, is a sufficient allegation to constitute the offence a forcible entry. The words "with a strong hand" mean something more than a common trespass. By Lawrence, J., in *Rex v. Wilson*, 8 T. R. 362, these words are said to imply that the entry was accompanied with that terror and violence which constitute the offence. See Rastall's Entries, 354; Bande's Case, Cro. Jac. 41.

It seems to us, therefore, that this indictment does well charge the offence of a forcible entry, and that such forcible entry is an offence at common law. We have considered it solely in the aspect of a charge of forcible entry, which alone is sufficient to maintain the indictment, and renders it immaterial whether it might also be sustained as a charge of forcible detainer. So also as an offence against our statutes, if the case required it, it might be proper to consider whether the provision of the Rev. Sts. c. 104, § 1, already referred to, and directly prohibiting the doing of the act complained of here, would not make such act a statute offence, punishable under the Rev. Sts. c. 139, § 1, as a case where an act was made criminal by a prohibitory statute, but no particular punishment annexed to the offence.

If a forcible entry is thus made a statute offence, then the pres-

ent conclusion of the indictment, charging it as an offence against the form of the statute, is correct. If, however, it is only an offence at common law, then the allegation just referred to may be rejected as surplusage; and judgment may be rendered upon the indictment, as upon an indictment for an offence at common law. In either view of the case the demurrer must be overruled.

*Demurrer overruled in the first case, and the exceptions overruled in the second.*

## CHAPTER XIV.

### OFFENCES AGAINST MORALS AND RELIGION.

#### ADULTERY.

*Commonwealth v. Call, 21 Pick. (Mass.) 509. (1839.)*

The defendant was tried in the Municipal Court upon an indictment for adultery committed within the county of Suffolk, and the jury returned the following special verdict, dated the 23d of March, 1838, and signed by the foreman: "The jury find the defendant guilty of having had sexual intercourse with Eliza Foster, the person named in the indictment, she at the same time being an unmarried woman, and the defendant being a married man and having a lawful wife at the time then living."

The defendant moved in arrest of judgment, and for cause assigned, that the facts set forth in the verdict might be adjudged not to constitute the crime of adultery, and that the prisoner was not guilty in manner and form alleged in the indictment.

The court overruled the motion in arrest, and passed judgment upon the special verdict, "that the facts set forth in said special verdict did constitute the crime of adultery, and that by said verdict the jury had found the prisoner guilty in manner and form alleged in the indictment." To this judgment the defendant excepted.

DEWEY, J., delivered the opinion of the Court. The counsel for the prisoner contends, that upon the special matter found by the jury on the trial of this cause, it was not competent for the Municipal Court to enter a judgment, that the jury had found the prisoner guilty of the crime of adultery in the manner and form alleged in the indictment.

The matter thus found is alleged to be insufficient for two reasons:—

1. That the facts of which the jury have found the prisoner guilty, do not constitute the crime of adultery:

2. That it does not appear that the offence was committed within the county of Suffolk.

The statute of this Commonwealth making adultery an offence punishable in the common law courts, has not given a definition of this crime. Such is generally the case in our criminal code, as to the higher crimes. They are not defined in our statute book, but are assumed to be well known as offences at common law, and under the general term denoting the offence, it is declared by law to be a crime, and the mode of trial and measure of punishment are alone prescribed by statute.

If questions arise in such cases as to what constitutes the offence, recurrence is to be had to well-established definitions sanctioned by books of authority and adopted by long usage, and with reference to which it may be supposed the legislature have acted in the enactment of the law punishing the offence.

It so happens, that on the present question we derive less aid than usual from the lights of the common law, the crime of adultery not being cognizable by the temporal courts in England as a public offence, but only as a private injury; and hence we have not that distinct character of this crime, well defined and made familiar to us by the books of common law, that would be found to exist in relation to other offences.

By the civil law, adultery could only be committed by the unlawful sexual intercourse of a man with a married woman. Thus, as is stated in Wood's Institute, 272, adultery is a carnal knowledge of another man's wife, and the connexion of a married man with a single woman does not make him guilty of the crime of adultery.

On the other, in the English ecclesiastical courts it is held that the offence of adultery is established by showing that the husband has had illicit intercourse with any person, and no distinction is taken whether the alleged offence was committed with a married or unmarried female.

Such is the general rule in cases of divorce granted for the cause of adultery, not only in England, but also, as I suppose, throughout the United States. Our ancient colonial statute (of 1646) punished with death the "crime of adultery with a married woman or espoused wife." The offence punishable by this law clearly would not have embraced the present case. Under the provincial statutes the punishment was much mitigated, and the offence described under the general term adultery, without the additional description of the offence being committed with a married woman.



The earliest statute on the subject after the adoption of the constitution, St. 1784, c. 40, contains, as was usual at that period, a preamble setting forth the objects of the statute, among which is stated that of enforcing "the due observance of the marriage covenants," thus indicating its general application to both the parties, rather than the more limited object of punishing the infidelity of the wife merely. This statute also punished the offence under the general term of adultery.

The statute of 1785, c. 69, authorized a divorce from the bonds of matrimony for adultery in either of the parties; and it is to be observed, that the same descriptive term is here used as in the statute making the offence a crime punishable in the courts of law, and the words are in no degree more extensive. The question naturally arises, whether it may not be fairly inferred that the legislature, using the same term, in two successive political years, as descriptive of an offence, did not intend that the same offence should be indicated by it in both cases. But as to the construction of the term adultery in the statute last cited, it has always been held to include the case of any unlawful intercourse by a married man.

Much light is also thrown upon the present question by the Revised Stat. c. 130, § 1, which is the existing law on the subject, and wherein it is provided, in addition to the former statute punishing the crime of adultery, that "when the crime is committed between a married woman and a man who is unmarried, the man shall be deemed guilty of adultery." This addition to the former statute provisions would be entirely unnecessary, if the definition of adultery were such as is alleged by the counsel for the prisoner. If the civil law definition of this crime had been adopted here, the unmarried man might for such an offence well be holden guilty of the crime of adultery, without this additional statute provision.

But it is well understood to have been the law of this Commonwealth prior to the Revised Statutes, that if the party was not a married man, the offence of having unlawful intercourse with a married woman would not be adultery in him. 6 Dane's Abr. 676.

We think it will be found that the same construction has been given to the statute of 1784, c. 40, as to that of 1785, c. 69, authorizing divorces for adultery, and that it has been uniformly holden

that the same offence which would subject the party to a divorce, would also sustain an indictment for the crime of adultery. Such certainly has been the rule practised upon in our criminal courts for many years, and although several convictions in such cases are remembered, no exceptions have been taken, bringing the question before this Court for revision.

The late Solicitor-General Davis, who was a very good criminal lawyer, and had the benefit of thirty years' experience in the office of public prosecutor, so understood the construction given by the court to the statute punishing this offence, as is apparent from the *Precedents* published by him at the close of his official duties, wherein are found forms of indictments for adultery, distinctly adapted to the case where the offence is committed by a married man with a single woman. *Davis's Precedents*, 48.

Whatever, therefore, may have been the original meaning of the term adultery, it is very obvious that we have in this Commonwealth adopted the definition given to it by the ecclesiastical courts, and this not merely in relation to divorces, but also as descriptive of a public crime. We hold the infidelity of the husband as well as that of the wife, the highly aggravated offence, constituting the crime of adultery. Familiar as the legislature must be supposed to have been with this construction of the statute of 1784, c. 40, they sanctioned in the *Revised Statutes* the same form of expression, without any restriction of the extended application given to it by the courts of law, and making no other alteration except that already referred to, enlarging its application so as to include within it the case of the unmarried man who should commit the offence with a married woman. The Court are satisfied that by the proper construction of the term adultery as used in our statutes, the offence is committed by a married man who shall have sexual intercourse with an unmarried woman.

Applying this rule of law to the facts specially found by the jury, they establish the crime of adultery to have been committed by the prisoner.

This brings us to the second objection taken to the sufficiency of this verdict, which is, that the jury have not found that the offence charged upon the prisoner 'was committed within the county of Suffolk.

It is a very familiar principle in the administration of the criminal law, that all the circumstances essential to sustaining the

indictment must be expressly found by the jury, and the court cannot supply a defect in the finding of the jury by intendment or implication. 1 Chitty's Crim. Law, 644; Bac. Abr. Verdict, D.

It is equally clear, that it must always appear that the jury have found the offence was committed within the county in which the indictment is found, or the court cannot give judgment against the prisoner. 1 Stark. Cr. Pl. 354; *The King v. Hazel*, 1 Leach, 406.

In the ordinary case of a general verdict of *guilty*, the jury, by the very terms of their verdict, find the prisoner guilty of all the material allegations in the indictment. Not so in a special verdict, for the very object of this departure from the usual form, is presumed to be for the purpose of declaring the prisoner guilty of certain facts only, with a view of submitting the question, whether those facts authorize a general verdict of *guilty*, to the judgment of the court. In such a case, if the facts thus found do not include all the essential elements of the offence charged upon the prisoner, he cannot be convicted.

The finding of the jury in the present case shows the defendant guilty of acts constituting the crime of adultery, but is entirely defective as to the fact where the crime was committed. The facts found by the jury may all be truly found, and yet they may have occurred in an adjacent county, or out of the Commonwealth. We cannot judicially know that the offence was committed in the county of Suffolk, the jury not having so said either directly, or by any reference to the indictment in their verdict.

The Court are therefore of opinion, that it was not competent for the Municipal Court to render a judgment upon this verdict, that the jury had found the prisoner guilty of the offence as charged in the indictment, and to this extent the exception taken to the ruling of the judge must be sustained.

The only remaining inquiry is, whether this defect in the finding of the jury entitles the prisoner to a judgment as upon a verdict of not guilty.

The finding of the jury here was altogether an imperfect and defective finding, and therefore not available either to the government as a verdict of guilty, or to the prisoner as a verdict of acquittal. It neither affirms nor denies as to the truth of any allegations in the indictment, other than as to the facts specially stated in the verdict. Had it found the prisoner not guilty except

as to the matter thus specially stated, it would have been effectual to discharge the prisoner and would be tantamount to a verdict of acquittal; but in its present form it cannot operate as such, and the result will be, that the prisoner must be put again on his trial. 1 Chitty's Crim. Law, 646; *Rex v. Woodfall*, 5 Burr. 2661; *Rex v. Hayes*, 2 Ld. Raym. 1522.

The bill of exceptions is sustained, and the case remanded to the Municipal Court for a new trial.

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### BIGAMY.

*People v. Brown*, 34 Mich. 339. (1876.)

COOLEY, CH. J.:

The defendant seeks to avoid the penalties of a bigamous marriage by showing that he is a negro, and that the other party to the marriage was a white woman, with whom under the statute it was impossible for him to contract marriage at all.—Comp. L., § 4724. The argument is, that if the ceremony of marriage has taken place between parties who, if single, would be incapable of contracting marriage, the marriage ceremony is merely idle and void, and the respondent cannot be said to have been married the second time at all.

The logic of the argument is not very obvious. It certainly cannot be based upon any idea that there must be something of binding and obligatory force in the second marriage; for every bigamous marriage is void, and it is the entering into the void marriage while a valid marriage exists that the statute punishes. Nor can we understand of what importance it can be that there are two elements of illegality in the case instead of one, or why the party should be relieved from the consequences of violating one statute because the act of doing so was a violation of another also.

The authorities sanction no such doctrine. There are loose statements in some of the cases that the second marriage must have been one that, but for the existence of the first, would have been valid; but these evidently relate to the acts and intent of the parties, and not to the legal ability to unite in a valid relation. It was decided in *Rex v. Penson*, 5 C. & P. 412, that bigamy was committed in marrying a woman under an assumed name, though

by law such a marriage between persons capable of contracting would be void. The case of *Regina v. Brawn*, 1 C. & K. 144, was similar to the present in its facts, and Lord Denman in summing up said: "It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy, otherwise it never could exist in ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether therefore the marriage of the two prisoners was or was not in itself prohibited, and therefore null and void, does not signify, for the woman, having a husband then alive, has committed the crime of bigamy, by doing all that in her lay by entering into marriage with another man." These cases are recognized in the case of *Hayes v. People*, 25 N. Y. 390, which is relied upon by the respondent, but which affords no countenance for his exceptions.

The recorder's court must be advised that we find no error in the record, and that judgment should be pronounced on the verdict.

The other Justices concurred

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#### ABORTION.

*Mills v. Commonwealth*, 13 Pa. St. 631. (1850.)

The opinion of the Court was delivered by COULTER, J.:

The error assigned is, that the indictment charges that the defendant, with intent to cause and procure the miscarriage and abortion of the said Mary Elizabeth Lutz, instead of charging the intent to cause and produce the miscarriage and abortion of the child. But it is a misconception of the learned counsel, that no abortion can be predicated of the act of untimely birth by foul means.

Miscarriage, both in law and philology, means the bringing forth the foetus before it is perfectly formed and capable of living; and is rightfully predicated of the woman, because it refers to the act of premature delivery. The word abortion is synonymous and equivalent to miscarriage, in its primary meaning. It has a secondary meaning, in which it is used to denote the offspring. But it was not used in that sense here, and ought not to have been.

It is a flagrant crime, at common law, to attempt to procure the miscarriage or abortion of the woman; because it interferes with and violates the mysteries of nature, in that process by which the human race is propagated and continued. It is a crime against nature, which obstructs the fountain of life, and therefore it is punished.

The next error assigned is, that it ought to have been charged in the count that the woman had become *quick*. But, although it has been so held in Massachusetts and some other states, it is not, I apprehend, the law, in Pennsylvania, and never ought to have been the law anywhere. It is not the murder of a living child, which constitutes the offence, but the destruction of gestation, by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated. The allegation in this indictment was therefore sufficient, to wit, "that she was then and there pregnant and big with child." By the well-settled and established doctrine of the common law, the civil rights of an infant *in ventre sa mere* are fully protected at all periods after conception; 3 Coke's Institutes. A count charging a wicked intent to procure miscarriage of a woman, "then and there being pregnant," by administering potions, &c., was held good on demurrer by the Supreme Court of this state; MS. Rep. January, 1846; Whart. Crim. Law, 308. There was, therefore, a crime at common law sufficiently set forth and charged in the indictment.

But although we see no error in the record, the sentence must be reformed on account of certain proceedings in this court and de hors this record. The imprisonment for one year is made to take effect after the termination of the sentence on another indictment for the same crime on Catharine Ann Lutz, and the sentence in that case is to take effect after the expiration of the sentence on another indictment against the same defendant for seducing Mary Elizabeth Lutz, under a promise to marry; which sentence was reversed and set aside by this court.

By the 1st sec. of the act of June 16th, 1836, the Supreme Court have power to correct all manner of error of the courts of this commonwealth, as well in criminal as civil pleas or proceedings, and therefore to reverse, modify or affirm such judgments or proceedings as the law doth or shall direct. We, therefore, in pursuance of this statute, order and direct that the sentence in this case shall

be so modified and reformed, as that the period of imprisonment, to wit, one year, shall be computed immediately from and after the expiration of the sentence, on the indictment preferred at the instance of Catharine Ann Lutz, referred to in this opinion; as the same sentence has been modified at this same time by this court. The clerk of the Quarter Sessions will therefore enter on the record that the sentence is so modified.

Judgment affirmed as modified.

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BLASPHEMY.

*Lindenmuller v. People, 33 Barb. (N. Y.) 548. (1861.)*

Error to the court of oyer and terminer of the city and county of New York. On the 5th day of July, 1860, the defendant was indicted in that court for an alleged misdemeanor in giving theatrical exhibitions on Sunday, the 20th day of May, 1860, contrary to the provisions of the "Act to preserve the public peace and order on the first day of the week, commonly called Sunday," passed April 17, 1860 (Laws of 1860, p. 999). On the 17th of November, 1860, the defendant was arraigned on said indictment, in the court of oyer and terminer, and pleaded not guilty thereto. The issue so joined came on to be tried on the same day, before Hon. GEORGE GOULD, a justice of the supreme court, and a jury duly impaneled to try said issue. The prosecution gave evidence tending to show that on the 20th day of May, 1860, the same being a Sunday, the defendant did exhibit a dramatic performance at the premises Nos. 199 and 201, Bowery, in the city of New York, the said premises being used in part as a theatrical establishment of which the defendant was the proprietor. It also appeared from the testimony, that the defendant, on the 11th day of April, 1860, by indenture in writing, hired from one Edward Hamann, landlord, the above described premises for a term of twenty-two weeks, commencing on the 16th day of April, 1860, at the weekly rent of \$110; and that he hired the said premises for the purpose expressly of giving dramatic entertainments therein daily, including all the Sundays during the said term, and that the only profit accruing to the defendant from said hiring, was derived from dramatic representations given on the said premises on Sundays.

That during the week the receipts were not sufficient to pay the expenses, but on Sundays largely exceeded the expenses; that the receipts on Sundays were more than during the other six days of the week. After the testimony on both sides was closed, the counsel for defense and prosecution respectively summed up the case to the jury. The counsel for the defendant asked the court to direct the jury to acquit the defendant, on the ground that the act under which the indictment was framed was unconstitutional and void. The court refused so to direct the jury, but on the contrary charged the jury that said act was constitutional and valid. To which charge the counsel for the defendant excepted. The jury rendered a verdict of "Guilty."

*By the Court, ALLEN, J.:*

The constitutionality of the law under which Lindenmuller was indicted and convicted does not depend upon the question whether or not christianity is a part of the common law of this state. Were that the only question involved, it would not be difficult to show that it was so, in a qualified sense—not to the extent that would authorize a compulsory conformity in faith and practice, to the creed and formula of worship of any sect or denomination, or even in those matters of doctrine and worship common to all denominations styling themselves christian, but to the extent that entitles the christian religion and its ordinances to respect and protection, as the acknowledged religion of the people. Individual consciences may not be enforced; but men of every opinion and creed may be restrained from acts which interfere with christian worship, and which tend to revile religion and bring it into contempt. The belief of no man can be constrained, and the proper expression of religious belief is guarantied to all; but this right, like every other right, must be exercised with strict regard to the equal rights of others; and when religious belief or unbelief leads to acts which interfere with the religious worship, and rights of conscience of those who represent the religion of the country, as established, not by law, but by the consent and usage of the community, and existing before the organization of the government, their acts may be restrained by legislation, even if they are not indictable at common law. Christianity is not the legal religion of the state, as established by law. If it were, it would be a civil or political institution, which it is not; but this is not inconsistent.



with the idea that it is in fact, and ever has been, the religion of the people. This fact is every where prominent in all our civil and political history, and has been, from the first, recognized and acted upon by the people, as well as by constitutional conventions, by legislatures and by courts of justice.

It is not disputed that christianity is a part of the common law of England; and in *Rex v. Woolston* (Str. 834), the court of king's bench would not suffer it to be debated, whether to write against christianity in general was not an offence punishable in the temporal courts at common law. The common law, as it was in force on the 20th day of April, 1777, subject to such alterations as have been made, from time to time, by the legislature, and except such parts of it as are repugnant to the constitution, is, and ever has been, a part of the law of the state. (Const. of 1846, art. 1, § 17; Const. of 1821, art. 7, § 13; Const. of 1777, § 25.) The claim is, that the constitutional guaranties for the free exercise and enjoyment of religious profession and worship are inconsistent with and repugnant to the recognition of christianity, as the religion of the people entitled to, and within the protection of, the law. It would be strange that a people, christian in doctrine and worship, many of whom or whose forefathers had sought these shores for the privilege of worshipping God in simplicity and purity of faith, and who regarded religion as the basis of their civil liberty, and the foundation of their rights, should, in their zeal to secure to all the freedom of conscience which they valued so highly, solemnly repudiate and put beyond the pale of the law, the religion which was dear to them as life, and dethrone the God who, they openly and avowedly professed to believe, had been their protector and guide as a people. Unless they were hypocrites, which will hardly be charged, they would not have dared, even if their consciences would have suffered them, to do so. Religious tolerance is entirely consistent with a recognized religion. Christianity may be conceded to be the established religion, to the qualified extent mentioned, while perfect civil and political equality, with freedom of conscience and religious preference, is secured to individuals of every other creed and profession. To a very moderate and qualified extent, religious toleration was secured to the people of the colony, by the charter of liberties and privileges, granted by his royal highness to the inhabitants of New York and its dependencies in 1683, (2 R. L. app. No. 2,) but was more

amply provided for in the constitution of 1777. It was then placed substantially upon the same footing on which it now stands. The constitution of 1777, § 38, ordained that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, should for ever thereafter be allowed, *provided* that the liberty of conscience thereby guarantied should not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state. The same provision was incorporated in the constitution of 1821, art. 7, § 3, and in that of 1846, art. 1, § 3. The convention that framed the constitution of 1777 ratified and approved the declaration of independence, and prefixed it to the constitution as a part of the preamble; and in that instrument a direct and solemn appeal is made "to the Supreme Judge of the world," and a "firm reliance on the protection of Divine Providence" for the support of the declaration is deliberately professed. The people, in adopting the constitution of 1821, expressly acknowledged with "gratitude the grace and beneficence of God," in permitting them to make choice of their form of government; and in ratifying the constitution of 1846, declare themselves "grateful to Almighty God" for their freedom. The first two constitutions of the state, reciting that "ministers of the gospel are by their profession dedicated to the service of God and the cure of souls, and ought not to be diverted from the great duties of their function," declared that no "minister of the gospel or priest of any denomination whatsoever should be eligible to or hold any civil or military office within the state;" and each of the constitutions has required an oath of office from all except some of the inferior officers taking office under it.

These provisions and recitals very clearly recognize some of the fundamental principles of the christian religion, and are certainly very far from ignoring God as the supreme ruler and judge of the universe, and the christian religion as the religion of the people, embodying the common faith of the community, with its ministers and ordinances, existing without the aid of, or political connection with, the state, but as intimately connected with a good government, and the only sure basis of sound morals.

The several constitutional conventions also recognize the christian religion as the religion of the state, by opening their daily sessions with prayer, by themselves observing the christian sabbath,

and by excepting that day from the time allowed to the governor for returning bills to the legislature.

Different denominations of christians are recognized, but this does not detract from the force of the recognition of God as the only proper object of religious worship, and the christian religion as the religion of the people, which it was not intended to destroy, but to maintain. The intent was to prevent the unnatural connection between church and state, which had proved as corrupting and detrimental to the cause of pure religion as it had been oppressive to the conscience of the individual. The founders of the government and the framers of our constitutions believed that christianity would thrive better, that purity in the church would be promoted, and the interests of religion advanced, by leaving the individual conscience free and untrammelled, precisely in accordance with the "benevolent principles of rational liberty," which guarded against "spiritual oppression and intolerance;" and "wisdom is justified of her children" in the experiment, which could hardly be said if blasphemy, sabbath-breaking, incest, polygamy and the like were protected by the constitution. They did, therefore, prohibit the establishment of a state religion, with its enabling and disabling statutes, its test oaths and ecclesiastical courts, and all the pains and penalties of nonconformity, which are only snares to the conscience, and every man is left free to worship God according to the dictates of his own conscience, or not to worship him at all, as he pleases. But they did not suppose they had abolished the sabbath as a day of rest for all, and of christian worship for those who were disposed to engage in it, or had deprived themselves of the power to protect their God from blasphemy and revilings, or their religious worship from unseemly interruptions. Compulsory worship of God in any form is prohibited, and every man's opinion on matters of religion, as in other matters, is beyond the reach of law. No man can be compelled to perform any act or omit any act as a duty to God; but this liberty of conscience in matters of faith and practice is entirely consistent with the existence, in fact, of the christian religion, entitled to and enjoying the protection of the law as the religion of the people of the state, and as furnishing the best sanctions of moral and social obligations. The public peace and public welfare are greatly dependent upon the protection of the religion of the country, and the preventing or punishing of offenses against it, and acts wantonly

committed subversive of it. The claim of the defense, carried to its necessary sequence, is, that the bible and religion, with all its ordinances, including the sabbath, are as effectually abolished as they were in France during the revolution, and so effectually abolished that duties may not be enforced as duties to the state, because they have been heretofore associated with acts of religious worship or connected with religious duties. A provision similar to ours is found in the constitution of Pennsylvania; and in *Vidal v. Girard's Executors*, (2 How. 127,) the question was discussed whether the christian religion was a part of the common law of that state; and Justice Story, in giving judgment, at page 198, after referring to the qualifications in the constitution, says: "So that we are compelled to admit, that although christianity be a part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public." The same principle was decided by the state court in *Updegraph v. Commonwealth*, (11 S. & R. 394). The same is held in Arkansas, (*Shaw v. State*, 5 Eng. 259). In our own state, in *People v. Ruggles*, (8 John. 291,) the court held that blasphemy against God, and contumelious reproach and profane ridicule of Christ or the holy scriptures, were offenses punishable at the common law in this state as public offenses. Chief Justice Kent says that to revile the religion professed by almost the whole community is an abuse of the right of religious opinion and free discussion secured by the constitution, and that the constitution does not secure the same regard to the religion of Mahomet or of the grand lama as to that of our Saviour, for the plain reason that we are a christian people, and the morality of the country is deeply engrafted upon christianity. He says, further, that the constitution "will be fully satisfied by a free and universal toleration, without any of the tests, disabilities or discriminations incident to a religious establishment. To construe it as breaking down the common law barriers against licentious, wanton and impious attacks upon christianity itself, would be an enormous perversion of its meaning."

This decision gives a practical construction to the "toleration" clause in the state constitution, and limits its effect to a prohibition of a church establishment by the state, and of all "discrimination or preference" among the several sects and denominations in the

“free exercise and enjoyment of religious profession and worship.” It does not, as interpreted by this decision, prohibit the courts or the legislature from regarding the christian religion as the religion of the people, as distinguished from the false religions of the world. This judicial interpretation has received the sanction of the constitutional convention of 1821, and of the people of the state in the ratification of that constitution, and again in adopting the constitution of 1846.

It was conceded in the convention of 1821 that the court in *People v. Ruggles* did decide that the christian religion was the law of the land, in the sense that it was preferred over all other religions, and entitled to the recognition and protection of the temporal courts by the common law of the state; and the decision was commented on with severity by those who regarded it as a violation of the freedom of conscience and equality among religionists secured by the constitution. Mr. Root proposed an amendment to obviate that decision, alleged by him to be against the letter and spirit of the constitution, to the effect that the judiciary should not declare any particular religion to be the law of the land. The decision was vindicated as a just exponent of the constitution and the relation of the christian religion to the state; and the amendment was opposed by Chancellor Kent, Daniel D. Tompkins, Col. Young, Mr. Van Buren, Rufus King and Chief Justice Spencer, and rejected by a large majority, and the former provision retained, with the judicial construction in *People v. Ruggles* fully recognized. (N. Y. State Conv. of 1821, 462, 574.) It is true that the gentlemen differed in their views as to the effect and extent of the decision, and as to the legal status of the christian religion in the state. One class, including Chief Justice Spencer and Mr. King, regarded christianity—the christian religion as distinguished from Mahomedanism, &c.—as a part of the common law adopted by the constitution; while another class, in which were included Chancellor Kent and Mr. Van Buren, were of the opinion that the decision was right, not because christianity was established by law, but because christianity was in fact the religion of the country, the rule of our faith and practice, and the basis of public morals. According to their views, as the recognized religion of the country, “the duties and injunctions of the christian religion” were interwoven with the law of the land, and were part and parcel of the common law, and that “maliciously to revile it is a public

grievance, and as much so as any other public outrage upon common decency and decorum." (Per Ch. Kent, in debate, page 576.) This difference in views is in no sense material, as it leads to no difference in practical results and conclusions. All agreed that the christian religion was engrafted upon the law, and entitled to protection as the basis of our morals and the strength of our government, but for reasons differing in terms and in words rather than in substance. Within the principle of the decision of *The People v. Ruggles*, as thus interpreted and approved and made a part of the fundamental law of the land by the rejection of the proposed amendment, every act done maliciously, tending to bring religion into contempt, may be punished at common law, and the christian sabbath, as one of the institutions of that religion, may be protected from desecration by such laws as the legislature, in their wisdom, may deem necessary to secure to the community the privilege of undisturbed worship, and to the day itself that outward respect and observance which may be deemed essential to the peace and good order of society, and to preserve religion and its ordinances from open reviling and contempt—and this not as a duty to God, but as a duty to society and to the state. Upon this ground the law in question could be sustained, for the legislature are the sole judges of the acts proper to be prohibited, with a view to the public peace, and as obstructing religious worship, and bringing into contempt the religious institutions of the people.

But as a civil and political institution, the establishment and regulation of a sabbath is within the just powers of the civil government. With us, the sabbath, as a civil institution, is older than the government. The framers of the first constitution found it in existence; they recognized it in their acts, and they did not abolish it, or alter it, or lessen its sanctions or the obligations of the people to observe it. But if this had not been so, the civil government might have established it. It is a law of our nature that one day in seven must be observed as a day of relaxation and refreshment, if not for public worship. Experience has shown that the observance of one day in seven as a day of rest "is of admirable service to a state, considered merely as a civil institution." (4 Bl. Com. 63.) We are so constituted, physically, that the precise portion of time indicated by the decalogue must be observed as a day of rest and relaxation, and nature, in the punishment inflicted for a violation of our physical laws, adds her sanction to the positive law

promulgated at Sinai. The stability of government, the welfare of the subject and the interests of society, have made it necessary that the day of rest observed by the people of a nation should be uniform, and that its observance should be to some extent compulsory, not by way of enforcing the conscience of those upon whom the law operates, but by way of protection to those who desire and are entitled to the day. The necessity and value of the sabbath is acknowledged by those not professing christianity. In December, 1841, in the French chamber of deputies, an Israelite expressed his respect for the institution of the Lord's day, and opposed a change of law which would deprive a class of children of the benefit of it; and in 1844, the consistory general of the Israelites, at Paris, decided to transfer the sabbath of the Jews to Sunday. A similar disposition was manifested in Germany. (Baylee's Hist. of Sab. 187.) As a civil institution, the selection of the day is at the option of the legislature; but for a christian people, it is highly fit and proper that the day observed should be that which is regarded as the christian sabbath, and it does not detract from the moral or legal sanction of the law of the state that it conforms to the law of God, as that law is recognized by the great majority of the people. In this state the sabbath exists as a day of rest by the common law, and without the necessity of legislative action to establish it; and all that the legislature attempt to do in the "sabbath laws" is to regulate its observance. The body of the constitution recognized Sunday as a day of rest, and an institution to be respected by not counting it as a part of the time allowed to the governor for examining bills submitted for his approval. A contract, the day of the performance of which falls on Sunday, must, in the case of instruments on which days of grace are allowed, be performed on the Saturday preceding, and in all other cases on Monday. (*Salter v. Burt*, 20 Wend. 205. *Avery v. Stewart*, 2 Conn. R. 69.) Compulsory performance on the sabbath cannot be required, but the law prescribes a substituted day. Redemption of land, the last day for which falls on Sunday, must be made the day before. (*People v. Luther*, 1 Wend. 42.) No judicial act can be performed on the sabbath, except as allowed by statute, while ministerial acts not prohibited are not illegal. (*Sayles v. Smith*, 12 Wend. 57. *Butler v. Kelsey*, 15 John. 177. *Field v. Park*, 20 id. 140.) Work done on a Sunday cannot be recovered for, there being no pretense that the parties keep the last day of the week,

and the work not being a work of necessity and charity. (*Watts v. Van Ness*, 1 Hill, 76. *Palmer v. City of New York*, 2 Sand. 318. *Smith v. Wilcox*, 19 Barb. 581; S. C. 25 id. 341.) The christian sabbath is then one of the civil institutions of the state, and to which the business and duties of life are, by the common law, made to conform and adapt themselves. The same cannot be said of the Jewish sabbath, or the day observed by the followers of any other religion. The respect paid to such days, other than that voluntarily paid by those observing them as days of worship, is in obedience to positive law. There is no ground of complaint in the respect paid to the religious feeling of those who conscientiously observe the seventh rather than the first day of the week, as a day of rest, by the legislation upon that subject, and exempting them from certain public duties and from the service of process on their sabbath, and excepting them from the operation of certain other statutes regulating the observance of the first day of the week. (1 R. S. 675, § 70. Laws of 1847, ch. 349.) It is not an infringement of the right of conscience, or an interference with the free religious worship of others, that sabbatarians are exempted from the service of civil process and protected in the exercise of their religion on their sabbath. Still less is it a violation of the rights of conscience of any that the sabbath of the people, the day set apart by common consent and usage from the first settlement of the land as a day of rest, and recognized by the common law of the state as such, and expressly recognized in the constitution as an existing institution, should be respected by the law-making power, and provision made to prevent its desecration by interrupting the worship or interfering with the rights of conscience, in any way, of the public as a christian people. The existence of the sabbath day as a civil institution being conceded, as it must be, the right of the legislature to control and regulate it and its observance is a necessary sequence. If precedents were necessary to establish the right to legislate upon the subject, they could be cited from the statutes and ordinances of every government really or nominally christian, and from the earliest period. In England as early as the reign of Athelstan, all merchandising on the Lord's day was forbidden under severe penalties; and from that time very many statutes have been passed in different reigns regulating the keeping of the sabbath, prohibiting fairs and markets, the sale of goods, assemblies or concourse of the people for any sports and pastimes



whatsoever, worldly labor, the opening of a house or room for public entertainment or amusement, the sale of beer, wine, spirits, &c. and other like acts on that day. There are other acts which are designed to compel attendance at church and religious worship, which would be prohibited by the constitution of this state as infringements upon the right to the free exercise and enjoyment of religious profession and worship. But the acts referred to do not relate to religious profession or worship, but to the civil obligations and duties of the subject. They have respect to his duties to the state, and not to God, and as such are within the proper limits of legislative power. There have been times in the history of the English government, when the day was greatly profaned, and practices tolerated at court and throughout the realm, on the sabbath and on other days, which would meet at this time with little public favor either there or here. But these exceptional instances do not detract from the force of the long series of acts of the British parliament, representing in legislation the sentiment of the British nation, as precedents and as a testimony in favor of the necessity and propriety of a legislative regulation of the sabbath. Our attention is called to the fact that James I. wrote a "Book of Sports," in which he declared that certain games and pastimes were lawful upon Sunday. The book was published in 1618, and by it he permitted the "lawful recreations" named, "after the end of divine service" on Sundays, "so as the same be had in due and convenient time, without impediment or neglect of divine service." The permission is thus qualified: "But withall we doe here account still as prohibited all unlawfull games to be used on Sundayes only, as beare and bull baitings, *interludes*, and at all times in the meaner sort of people prohibited, bowling." (Baylee's Hist. Sabbath, 157.) Lindenmuller's theatre would have been prohibited even by King James' Book of Sports.

In most, if not all the states of the union, laws have been passed against sabbath-breaking, and prohibiting the prosecution of secular pursuits upon that day; and in none of the states, to my knowledge, except in California, have such laws been held by the courts to be repugnant to the free exercise of religious profession and worship, or a violation of the rights of conscience, or an excess or abuse of the legislative power, while in most states the legislation has been upheld by the courts and sustained by well-reasoned and able opinions. (*Updegraph v. The Commonwealth*, 11 S. & R.

394. *Show v. State of Arkansas*, 5 Eng. (Ark.) 259. *Bloom v. Richards*, 2 Ohio R. 387. *Warne v. Smith*, 8 Conn. R. 14. *Johnston v. Com.*, 10 Harris, 102. *State v. Ambs*, 20 Mis. 214. *Story v. Elliot*, 8 Cowen, 27.)

As the sabbath is older than our state government, was a part of the laws of the colony, and its observance regulated by colonial laws, state legislation upon the subject of its observance was almost coeval with the formation of the state government. If there were any doubt about the meaning of the constitution securing freedom in religion, the contemporaneous and continued acts of the legislature under it would be very good evidence of the intent and understanding of its framers, and of the people who adopted it as their fundamental law. As early as 1788, traveling, work, labor and exposing of goods to sale on that day were prohibited. (2 Greenl. 89.) In 1789 the sale of spirituous liquors was prohibited, (Andrews, 467;) and from that time statutes have been in force to prevent sabbath desecration, and prohibiting acts upon that day which would be lawful on other days of the week. Early in the history of the state government, the objections taken to the act under consideration were taken before the council of revision, to an act to amend the act entitled "An act for suppressing immorality," which undertook to regulate sabbath observance, because the provisions as was claimed militated against the constitution, by giving a preference to one class of christians and oppressing others; because it in some manner prescribed the mode of keeping the sabbath; and because it was inexpedient to impose obligations on the conscience of men in matters of opinion. The council, consisting of Governor Jay, Chief Justice Lansing, and Judges Lewis and Benson, overruled the objections and held them not well taken. (Street's N. Y. Council of Rev. 422.) I have not access to the California case referred to, (*Ex parte Newman*, 9 Cal. 502,) but with all respect for the court pronouncing the decision, as authority in this state, the opinion of the council of revision thus constituted, and deliberately pronounced, should outweigh it. If the court in California rest their decision upon a want of power in the legislature to compel religious observances, I should not dissent from the position, and the only question would be whether the act did thus trench on the inviolable rights of the citizen. If it merely restrained the people from secular pursuits and from practices which the legislature deemed hurtful to the morals and

good order of society, it would not go beyond the proper limits of legislation. The act complained of here compels no religious observance, and offenses against it are punishable not as sins against God, but as injurious to and having a malignant influence on society. It rests upon the same foundation as a multitude of other laws upon our statute book, such as those against gambling, lotteries, keeping disorderly houses, polygamy, horse-racing, profane cursing and swearing, disturbance of religious meetings, selling of intoxicating liquor on election days within a given distance of the polls, &c. All these and many others do to some extent restrain the citizen and deprive him of some of his natural rights; but the legislature have the right to prohibit acts injurious to the public and subversive of the government, or which tend to the destruction of the morals of the people and disturb the peace and good order of society. It is exclusively for the legislature to determine what acts should be prohibited as dangerous to the community. The laws of every civilized state embrace a long list of offenses which are such merely as *mala prohibita*, as distinguished from those which are *mala in se*. If the argument in behalf of the plaintiff in error is sound, I see no way of saving the class of *mala prohibita*. Give every one his natural rights, or what are claimed as natural rights, and the list of civil offenses will be confined to those acts which are *mala in se*, and a man may go naked through the streets, establish houses of prostitution *ad libitum* and keep a faro-bank on every corner. This would be repugnant to every idea of a civilized government. It is the right of the citizen to be protected from offenses against decency, and against acts which tend to corrupt the morals and debase the moral sense of the community. Regarding the sabbath as a civil institution, well established, it is the right of the citizen that it should be kept and observed in a way not inconsistent with its purpose and the necessity out of which it grew, as a day of rest, rather than as a day of riot and disorder, which would be effectually to overthrow it, and render it a curse rather than a blessing.

Woodward, J. in *Johnston v. Com.* (10 Harris, 102,) says: "The right to rear a family with a becoming regard to the institutions of christianity, and without compelling them to witness the hourly infractions of one of its fundamental laws; the right to enjoy the peace and good order of society, and the increased securities of life and property which result from a decent observance of

the sabbath; the right of the poor to rest from labor without diminution of wages;" the right of beasts to the rest which nature calls for—are real, substantial rights, and as much the subject of governmental protection as any other right of person or property. But it is urged that it is the right of the citizen to regard the sabbath as a day of recreation and amusement, rather than as a day of rest and religious worship, and that he has a right to act upon that belief and engage in innocent amusements and recreations. This position it is not necessary to gainsay. But who is to judge and decide what amusements and pastimes are innocent, as having no direct or indirect baneful influence upon community, as not in any way disturbing the peace and quiet of the public, as not unnecessarily interfering with the equally sacred rights of conscience of others? May not the legislature, following the example of James I., which was cited to us as a precedent, declare what recreations are lawful, and what are not lawful as tending to a breach of the peace or a corruption of the morals of the people? That is not innocent which may operate injuriously upon the morals of the old or young, which tends to interrupt the peaceable and quiet worship of the sabbath, and which grievously offends the moral sense of the community, and thus tends to a breach of the peace. It may well be that the legislature, in its wisdom, thought that a theater was eminently calculated to attract all classes, and the young especially, on a day when they were released from the confinement incident to the duties of the other days of the week, away from the house of worship and other places of proper rest, relaxation and instruction, and bring them under influence not tending to elevate their morals and to subject them to temptation to other vices entirely inconsistent with the safety of society. The gathering of a crowd on a Sunday at a theater, with its drinking saloons, and its usual, if not necessary, facilities for and inducements to licentiousness and other kindred vices, the legislature might well say was not consistent with the peace, good order and safety of the city. They might well be of the opinion that such a place would be "a nursery of vice, a school of preparation to qualify young men for the gallows and young women for the brothel." But whatever the reasons may have been, it was a matter within the legislative discretion and power, and their will must stand as the reason of the law.

We could not, if we would, review their discretion and sit in

judgment upon the expediency of their acts. We cannot declare that innocent which they have adjudged baneful and have prohibited as such. The act in substance declares a Sunday theatre to be a nuisance, and deals with it as such. The constitution makes provision for this case by providing that the liberty of conscience secured by it "shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state." The legislature have declared that Sunday theaters are of this character, and come within the description of acts and practices which are not protected by the constitution, and they are the sole judges. The act is clearly constitutional, as dealing with and having respect to the sabbath as a civil and political institution, and not affecting to interfere with religious belief or worship, faith or practice.

It was conceded upon the argument that the legislature could entirely suppress theaters and prohibit theatrical exhibitions. This, I think, yields the whole argument, for as the whole includes all its parts and the greater includes the lesser, the power of total suppression includes the power of regulation and partial suppression. If they can determine what circumstances justify a total prohibition, they can determine under what circumstances the exhibitions may be innocuous, and under what circumstances and at what times they may be baneful, so as to justify a prohibition.

The other points made and argued are of less general importance, as they only affect this particular case, and notwithstanding they were ably and ingeniously argued, I have been unable to appreciate the views taken by the learned counsel for the plaintiff in error.

The law does not touch private property or impair its value. The possession and use of it, except for a single purpose and upon a given day, and the right to the possession and use, is as absolute to the plaintiff in error as it was the day before the passage of the law. The restraint upon the use of the property is incidental to the exercise of a power vested in the legislature to legislate for the whole state. The ownership and enjoyment of property cannot be absolute in the sense that incidentally the right may not be controlled or affected by public legislation. Public safety requires that powder magazines should not be kept in a populous neighborhood; public health requires that certain trades and manufactures should not be carried on in crowded localities; public interest requires that certain callings should be exercised

by a limited number of persons and at a limited number of places; the legislative promotion of these objects necessarily qualifies the absolute ownership of property to the extent that it prohibits the use of it in the manner and for the purpose deemed inconsistent with the public good, but that deprives no man of his property or impairs its legal value. The fact that the plaintiff in error leased the property with a view to its occupancy for the purposes of a Sunday theater does not vary the question. He might have bought it for the same purpose, but that would by no means lessen the power of the legislature, or give him an indefeasible right to use it for the purpose intended, or to establish or perpetuate a public nuisance. The power of the legislature cannot thus be crippled or taken from them. As lessee he is *pro hac vice* the owner. He took his lease as every man takes any estate, subject to the right of the legislature to control the use of it so far as the public safety requires.

The contract with the performers, if one exists, for their services on the sabbath, stands upon the same footing, and is also subject to another answer, to wit, that the contract for sabbath work was void without the law of 1860. (*Smith v. Wilcox*, *Watts v. Van Ness*, *Palmer v. New York*, *supra*.) The sovereign power must, in many cases, prescribe the manner of exercising individual rights over property. The general good requires it, and to this extent the natural rights of individuals are surrendered. Every public regulation in a city does in some sense limit and restrict the absolute right of the individual owner of property. But this is not a legal injury. If compensation were wanted, it is found in the protection which the owner derives from the government, and perhaps from some other restraint upon his neighbor in the use of his property. It is not a destruction or an appropriation of the property, and is not within any constitutional inhibition. (*Vanderbilt v. Adams*, 7 Cowen, 349. *People v. Walbridge*, 6 id. 512. *Mayor &c. of New York v. Miln*, 11 Peters, 102. 3 Story's Const. Law, 163.)

The conviction was right and the judgment must be affirmed. [New York General Term, February 4, 1861. Clerke, Sutherland and Allen, Justices.]

## CHAPTER XV.

### JURISDICTION.

#### *Jurisdiction of the Federal Government.*

*United States v. Rodgers, 150 U. S. 249. (1893.)*

In February, 1888, the defendant, Robert S. Rodgers and others, were indicted in the District Court of the United States for the Eastern District of Michigan for assaulting, in August, 1887, with a dangerous weapon, one James Downs, on board of the steamer Alaska, a vessel belonging to citizens of the United States, and then being within the admiralty jurisdiction of the United States, and not within the jurisdiction of any particular State of the United States, viz., within the territorial limits of the Dominion of Canada.

MR. JUSTICE FIELD delivered the opinion of the court.

Several questions of interest arise upon the construction of section 5346 of the Revised Statutes, upon which the indictment in this case was found. The principal one is whether the term "high seas," as there used, is applicable to the open, unenclosed waters of the Great Lakes, between which the Detroit River is a connecting stream. The term was formerly used, particularly by writers on public law, and generally in official communications between different governments, to designate the open, unenclosed waters of the ocean, or of the British seas, outside of their ports and havens. At one time it was claimed that the ocean, or portions of it, were subject to the exclusive use of particular nations. The Spaniards, in the 16th century, asserted the right to exclude all others from the Pacific Ocean. The Portuguese claimed, with the Spaniards, under the grant of Pope Alexander VI., the exclusive use of the Atlantic Ocean west and south of a designated line. And the English, in the 17th century, claimed the exclusive right to navigate the seas surrounding Great Britain. Woolsey on International Law, § 55.

In the discussions which took place in support of and against these extravagant pretensions the term "high seas" was applied,

in the sense stated. It was also used in that sense by English courts and law writers. There was no discussion with them as to the waters of other seas. The public discussions were generally limited to the consideration of the question whether the high seas, that is, the open, unenclosed seas, as above defined, or any portion thereof, could be the property or under the exclusive jurisdiction of any nation, or whether they were open and free to the navigation of all nations. The inquiry in the English courts was generally limited to the question whether the jurisdiction of the admiralty extended to the waters of bays and harbors, such extension depending upon the fact whether they constituted a part of the high seas.

In his treatise on the rights of the sea, Sir Matthew Hale says: "The sea is either that which lies within the body of a county, or without. That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and, therefore, within the jurisdiction of the sheriff or coroner. That part of the sea which lies not within the body of a county is called the main sea or ocean." *De Jure Maris*, c. iv. By the "main sea" Hale here means the same thing expressed by the term "high sea"—"*mare altum*," or "*le haut meer*."

In *Waring v. Clarke*, 5 How. 440, 453, this court said that it had been frequently adjudicated in the English common law courts since the restraining statutes of Richard II. and Henry IV., "that high seas mean that portion of the sea which washes the open coast." In *United States v. Grush*, 5 Mason, 290, it was held by Mr. Justice Story, in the United States Circuit Court, that the term "high seas," in its usual sense, expresses the unenclosed ocean or that portion of the sea which is without the *fauces terræ* on the sea coast, in contradistinction to that which is surrounded or enclosed between narrow headlands or promontories. It was the open, unenclosed waters of the ocean, or the open, unenclosed waters of the sea, which constituted the "high seas" in his judgment. There was no distinction made by him between the ocean and the sea, and there was no occasion for any such distinction. The question in issue was whether the alleged offences were committed within a county of Massachusetts on the sea coast, or without it, for in the latter case they were committed upon the high seas and within the statute. It was held that they were committed in the county of Suffolk, and thus were not covered by the statute.



If there were no seas other than the ocean, the term "high seas" would be limited to the open, unenclosed waters of the ocean. But as there are other seas besides the ocean, there must be high seas other than those of the ocean. A large commerce is conducted on seas other than the ocean and the English seas, and it is equally necessary to distinguish between their open waters and their ports and havens, and to provide for offences on vessels navigating those waters and for collisions between them. The term "high seas" does not, in either case, indicate any separate and distinct body of water; but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the coast. This distinction was observed by Latin writers between the ports and havens of the Mediterranean and its open waters—the latter being termed the high seas. In that sense the term may also be properly used in reference to the open waters of the Baltic and the Black Sea, both of which are inland seas, finding their way to the ocean by a narrow and distant channel. Indeed, wherever there are seas in fact, free to the navigation of all nations and people on their borders, their open waters outside of the portion "surrounded or enclosed between narrow headlands or promontories," on the coast, as stated by Mr. Justice Story, or "without the body of a county," as declared by Sir Matthew Hale, are properly characterized as high seas, by whatever name the bodies of water of which they are a part may be designated. Their names do not determine their character. There are, as said above, high seas on the Mediterranean (meaning outside of the enclosed waters along its coast), upon which the principal commerce of the ancient world was conducted and its great naval battles fought. To hold that on such seas there are no high seas, within the true meaning of that term, that is, no open, unenclosed waters, free to the navigation of all nations and people on their borders, would be to place upon that term a narrow and contracted meaning. We prefer to use it in its true sense, as applicable to the open, unenclosed waters of all seas, than to adhere to the common meaning of the term two centuries ago, when it was generally limited to the open waters of the ocean and of seas surrounding Great Britain, the freedom of which was then the principal subject of discussion. If it be conceded, as we think it must be, that the open, unenclosed waters of the Mediterranean are high seas, that

concession is a sufficient answer to the claim that the high seas always denote the open waters of the ocean.

Whether the term is applied to the open waters of the ocean or of a particular sea, in any case, will depend upon the context or circumstances attending its use, which in all cases affect, more or less, the meaning of language. It may be conceded that if a statement is made that a vessel is on the high seas, without any qualification by language or circumstance, it will be generally understood as meaning that the vessel is upon the open waters of one of the oceans of the world. It is true, also, that the ocean is often spoken of by writers on public law as *the sea*, and characteristics are then ascribed to the sea generally which are properly applicable to the ocean alone; as, for instance, that its open waters are the highway of all nations. Still the fact remains that there are other seas than the ocean whose open waters constitute a free highway for navigation to the nations and people residing on their borders, and are not a free highway to other nations and people, except there be free access to those seas by open waters or by conventional arrangements.

As thus defined, the term would seem to be as applicable to the open waters of the great Northern lakes as it is to the open waters of those bodies usually designated as seas. The Great Lakes possess every essential characteristic of seas. They are of large extent in length and breadth; they are navigable the whole distance in either direction by the largest vessels known to commerce; objects are not distinguishable from the opposite shores; they separate, in many instances, States, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debouch into the ocean. The fact that their waters are fresh and not subject to the tides, does not affect their essential character as seas. Many seas are tideless, and the waters of some are saline only in a very slight degree.

The waters of Lake Superior, the most northern of these lakes, after traversing nearly 400 miles, with an average breadth of over 100 miles, and those of Lake Michigan, which extend over 350 miles, with an average breadth of 65 miles, join Lake Huron, and, after flowing about 250 miles, with an average breadth of 70 miles, pass into the river St. Clair; thence through the small lake of St. Clair into the Detroit River; thence into Lake Erie and, by the Niagara River, into Lake Ontario; whence they pass, by the river

St. Lawrence, to the ocean, making a total distance of over 2,000 miles. *Ency. Britannica*, vol. 21, p. 178. The area of the Great Lakes, in round numbers, is 100,000 square miles. *Ibid.* vol. 14, p. 217. They are of larger dimensions than many inland seas which are at an equal or greater distance from the ocean. The waters of the Black Sea travel a like distance before they come into contact with the ocean. Their first outlet is through the Bosphorus, which is about 20 miles long and for the greater part of its way less than a mile in width, into the sea of Marmora, and through that to the Dardanelles, which is about 40 miles in length and less than four miles in width, and then they find their way through the islands of the Greek Archipelago, up to the Mediterranean Sea, past the Straits of Gibraltar to the ocean, a distance, also, of over 2,000 miles.

In the *Genesee Chief* case, 12 How. 443, this court, in considering whether the admiralty jurisdiction of the United States extended to the Great Lakes, and speaking, through Chief Justice Taney, of the general character of those lakes, said: "These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established, neither can the other." (p. 453.)

After using this language, the Chief Justice commented upon the inequality which would exist, in the administration of justice, between the citizens of the States on the lakes, if, on account of the absence of tide water in those lakes, they were not entitled to the remedies afforded by the grant of admiralty jurisdiction of the Constitution, and the citizens of the States bordering on the ocean or upon navigable waters affected by the tides. The court, perceiving that the reason for the exercise of the jurisdiction did not in fact depend upon the tidal character of the waters, but upon their practical navigability for the purposes of commerce,

disregarded the test of tide water prevailing in England as inapplicable to our country with its vast extent of inland waters. Acting upon like considerations in the application of the term "high seas" to the waters of the Great Lakes, which are equally navigable, for the purposes of commerce, in all respects, with the bodies of water usually designated as seas, and are in no respect affected by the tidal or saline character of their waters, we disregard the distinctions made between salt and fresh water seas, which are not essential, and hold that the reason of the statute, in providing for protection against violent assaults on vessels in tidal waters, is no greater but identical with the reason for providing against similar assaults on vessels in navigable waters that are neither tidal nor saline. The statute was intended to extend protection to persons on vessels belonging to citizens of the United States, not only upon the high seas, but in all navigable waters of every kind out of the jurisdiction of any particular State, whether moved by the tides or free from their influence.

The character of these lakes as seas was recognized by this court in the recent Chicago Lake Front case, where we said: "These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide." "In other respects," we added, "they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes." *Illinois Central Railroad v. Illinois*, 146 U. S. 387, 435.

It is to be observed also that the term "high" in one of its significations is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public is a "high" way. So a large body of navigable water other than a river, which is of an extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation or people, but is the free highway of adjoining nations or people, must fall under the definition of "high seas" within the meaning of the statute. We may as appropriately designate the open, unenclosed waters of the lakes as the high seas of the lakes, as to designate similar

waters of the ocean as the high seas of the ocean, or similar waters of the Mediterranean as the high seas of the Mediterranean.

The language of section 5346, immediately following the term "high seas" declaring the penalty for violent assaults when committed on board of a vessel in any arm of the sea or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, equally as when committed on board of a vessel on the high seas, lends force to the construction given to that term. The language used must be read in conjunction with that term, and as referring to navigable waters out of the jurisdiction of any particular State, but connecting with the high seas mentioned. The Detroit River, upon which was the steamer *Alaska* at the time the assault was committed, connects the waters of Lake Huron (with which, as stated above, the waters of Lake Superior and Lake Michigan join) with the waters of Lake Erie, and separates the Dominion of Canada from the United States, constituting the boundary between them, the dividing line running nearly midway between its banks, as established by commissioners, pursuant to the treaty between the two countries. 8 Stat. 274, 276. The river is about 22 miles in length and from one to three miles in width, and is navigable at all seasons of the year by vessels of the largest size. The number of vessels passing through it each year is immense. Between the years 1880 and 1892, inclusive, they averaged from thirty-one to forty thousand a year, having a tonnage varying from sixteen to twenty-four millions. In traversing the river they are constantly passing from the territorial jurisdiction of the one nation to that of the other. All of them, however, so far as transactions had on board are concerned, are deemed to be within the country of their owners. Constructively they constitute a part of the territory of the nation to which the owners belong. Whilst they are on the navigable waters of the river they are within the admiralty jurisdiction of that country. This jurisdiction is not changed by the fact that each of the neighboring nations may in some cases assert its own authority over persons on such vessels in relation to acts committed by them within its territorial limits. In what cases jurisdiction by each country will be thus asserted and to what extent, it is not necessary to inquire, for no question on that point is presented for our consideration. The general rule is that the country to which the vessel belongs will exercise jurisdic-

tion over all matters affecting the vessel or those belonging to her, without reference of the local government, unless they involve its peace, dignity, or tranquillity, in which case it may assert its authority. Wildenhus's case, 120 U. S. 1, 12; Halleck on International Law, c. vii, § 26, p. 172. The admiralty jurisdiction of the country of the owners of the steamer upon which the offence charged was committed is not denied. They being citizens of the United States, and the steamer being upon navigable waters, it is deemed to be within the admiralty jurisdiction of the United States. It was, therefore, perfectly competent for Congress to enact that parties on board committing an assault with a dangerous weapon should be punished when brought within the jurisdiction of the District Court of the United States. But it will hardly be claimed that Congress by the legislation in question intended that violent assaults committed upon persons on vessels owned by citizens of the United States in the Detroit River, without the jurisdiction of any particular State, should be punished, and that similar offences upon persons on vessels of like owners upon the adjoining lakes should be unprovided for. If the law can be deemed applicable to offences committed on vessels in any navigable river, haven, creek, basin, or bay, connecting with the lakes, out of the jurisdiction of any particular State, it would not be reasonable to suppose that Congress intended that no remedy should be afforded for similar offences committed on vessels upon the lakes, to which the vessels on the river, in almost all instances, are directed, and upon whose waters they are to be chiefly engaged. The more reasonable inference is that Congress intended to include the open, unenclosed waters of the lakes under the designation of high seas. The term, in the eye of reason, is applicable to the open, unenclosed portion of all large bodies of navigable waters, whose extent cannot be measured by one's vision, and the navigation of which is free to all nations and people on their borders, by whatever names those bodies may be locally designated. In some countries small lakes are called seas, as in the case of the Sea of Galilee, in Palestine. In other countries large bodies of water, greater than many bodies denominated seas, are called lakes, gulfs, or basins. The nomenclature, however, does not change the real character of either, nor should it affect our construction of terms properly applicable to the waters of either. By giving to the term "high seas" the construction indicated, there is consistency and sense in the whole

statute, but there is neither if it be disregarded. If the term applies to the open, unenclosed waters of the lakes, the application of the legislation to the case under indictment cannot be questioned, for the Detroit River is a water connecting such high seas, and all that portion which is north of the boundary line between the United States and Canada is without the jurisdiction of any State of the Union. But if they be considered as not thus applying, it is difficult to give any force to the rest of the statute without supposing that Congress intended to provide against violence on board of vessels in navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any particular State, and intentionally omitted the much more important provision for like violence and disturbances on vessels upon the Great Lakes. All vessels in any navigable river, haven, creek, basin, or bay of the lakes, whether within or without the jurisdiction of any particular State, would some time find their way upon the waters of the lakes; and it is not a reasonable inference that Congress intended that the law should apply to offences only on a limited portion of the route over which the vessels were expected to pass, and that no provision should be made for such offences over a much greater distance on the lakes.

Congress in thus designating the open, unenclosed portion of large bodies of water, extending beyond one's vision, naturally used the same term to indicate it as was used with reference to similar portions of the ocean or of bodies which had been designated as seas. When Congress, in 1790, first used that term the existence of the Great Lakes was known; they had been visited by great numbers of persons in trading with the neighboring Indians, and their immense extent and character were generally understood. Much more accurate was this knowledge when the act of March 3, 1825, was passed, 4 Stat. 115, c. 65, and when the provisions of section 5346 were reenacted in the Revised Statutes in 1874. In all these cases, when Congress provided for the punishment of violence on board of vessels, it must have intended that the provision should extend to vessels on those waters the same as to vessels on seas, technically so called. There were no bodies of water in the United States to any portion of which the term "high seas" was applicable if not to the open, unenclosed waters of the Great Lakes. It does not seem reasonable to suppose that Congress intended to confine its legislation to the high seas of the

ocean, and to its navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any State, and to make no provision for offences on those vast bodies of inland waters of the United States. There are vessels of every description on those inland seas now carrying on a commerce greater than the commerce on any other inland seas of the world. And we cannot believe that the Congress of the United States purposely left for a century those who navigated and those who were conveyed in vessels upon those seas without any protection.

The statute under consideration provides that every person who, upon the high seas or in any river connecting with them, as we construe the language, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, commits, on board of any vessel belonging in whole or in part to the United States, or any citizen thereof, an assault on another with a dangerous weapon or with intent to perpetrate a felony, shall be punished, etc. The Detroit River, from shore to shore, is within the admiralty jurisdiction of the United States, and connects with the open waters of the lakes—high seas, as we hold them to be, within the meaning of the statute. From the boundary line, near its centre, to the Canadian shore it is out of the jurisdiction of the State of Michigan. The case presented is therefore directly within its provisions. The act of Congress of September 4, 1890, 26 Stat. 424, c. 874 (1 Sup. to the Rev. Stat. chap. 874, p. 799), providing for the punishment of crimes subsequently committed on the Great Lakes, does not, of course, affect the construction of the law previously existing.

We are not unmindful of the fact that it was held by the Supreme Court of Michigan in *People v. Tyler*, 7 Michigan, 161, that the criminal jurisdiction of the Federal courts did not extend to offences committed upon vessels on the lakes. The judges who rendered that decision were able and distinguished; but that fact, whilst it justly calls for a careful consideration of their reasoning, does not render their conclusion binding or authoritative upon this court. Their opinions show that they did not accept the doctrine extending the admiralty jurisdiction to cases on the lakes and navigable rivers, which is now generally, we might say almost universally, received as sound by the judicial tribunals of the country. It is true, as there stated, that, as a general principle, the criminal laws of a nation do not operate beyond its territorial limits, and



that to give any government, or its judicial tribunals, the right to punish any act or transaction as a crime, it must have occurred within those limits. We accept this doctrine as a general rule, but there are exceptions to it as fully recognized as the doctrine itself. One of those exceptions is that offences committed upon vessels belonging to citizens of the United States, within their admiralty jurisdiction (that is, within navigable waters), though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within their territorial jurisdiction. As we have before stated, a vessel is deemed part of the territory of the country to which she belongs. Upon that subject we quote the language of Mr. Webster, while Secretary of State, in his letter to Lord Ashburton of August, 1842. Speaking for the government of the United States, he stated with great clearness and force the doctrine which is now recognized by all countries. He said: "It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the State retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign State or sovereignty, the offence is cognizable and punishable by the proper court of the United States in the same manner as if such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law,

as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself." 6 Webster's Works, 306, 307.

We do not accept the doctrine that, because by the treaty between the United States and Great Britain the boundary line between the two countries is run through the centre of the lakes, their character as seas is changed, or that the jurisdiction of the United States to regulate vessels belonging to their citizens navigating those waters and to punish offences committed upon such vessels, is in any respect impaired. Whatever effect may be given to the boundary line between the two countries, the jurisdiction of the United States over the vessels of their citizens navigating those waters and the persons on board remains unaffected. The limitation to the jurisdiction by the qualification that the offences punishable are committed on vessels in any arm of the sea, or in any river, haven, creek, basin or bay "without the jurisdiction of any particular State," which means without the jurisdiction of any State of the Union, does not apply to vessels on the "high seas" of the lakes, but only to vessels on the waters designated as connecting with them. So far as vessels on those seas are concerned, there is no limitation named to the authority of the United States. It is true that lakes, properly so called, that is, bodies of water whose dimensions are capable of measurement by the unaided vision, within the limits of a State, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which cannot be measured by the unaided vision, and which are navigable at all times in all directions, and border on different nations or States or people, and find their outlet in the ocean as in the present case, are seas in fact, however they may be designated. And seas in fact do not cease to be such, and become lakes, because by local custom they may be so called.

In our judgment the District Court of the Eastern District of Michigan had jurisdiction to try the defendant upon the indictment found, and it having been transferred to the Circuit Court,

that court had jurisdiction to proceed with the trial, and the demurrer to its jurisdiction should have been overruled. Our opinion, in answer to the certificate, is that

*The courts of the United States have jurisdiction, under section 5346 of the Revised Statutes, to try a person for an assault, with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State, and within the territorial limits of the Dominion of Canada; and it will be returned to the Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan, and it is so ordered.*

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*State Jurisdiction.*

*State v. Carter, 27 N. J. L. 499. (1859.)*

This cause was tried at the Hudson Oyer and Terminer, and was brought before this court on questions reserved upon the trial. The facts in the case and the points presented to the court appear in the opinion delivered in this court.

Argued at February Term, 1859, before the CHIEF JUSTICE and Justices OGDEN, VREDENBURGH and WHELPLEY.

The opinion of the court was delivered by VREDENBURGH, J.:

The indictment charges that the defendant, on the 29th of December, 1858, in the city of New York, gave one Brushingham several mortal bruises, of which, until the 31st of December, 1858, as well in New York as in Hudson county, in this state, he languished, and of which, in said Hudson county, he then died. To this indictment the defendant pleaded that the court had not jurisdiction of the cause. The defendant, we must assume, was a citizen of the State of New York. Nothing was *done* by the defendant in this state. When the blow was given, *both* parties were out of its jurisdiction, and within the jurisdiction of the State of New York. The only fact connected with the offence, alleged to have taken place within our jurisdiction, is that *after* the injury, the deceased came into, and died in this state. This is not the case where a man stands on the New York side of the line, and shooting across the border, kills one in New Jersey. When that is so, the blow is

in fact struck in New Jersey. It is the defendant's act in this state. The passage of the ball, after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile, passes over a boundary in the act of striking, is a matter of no consequence. The act is where it strikes, as much where the party who strikes stands out of the state, as where he stands in it.

Here no act is done in this state by the defendant. He sent no missile, or letter, or message, that operated as an act within this state. The coming of the party injured into this state afterwards was his own voluntary act, and in no way the act of the defendant. If the defendant is liable here at all, it must be solely because the deceased came and died here after he was injured. Can that, in the nature of things, make the defendant guilty of murder or manslaughter here? If it can, then for a year after an injury is inflicted, murder, as to its jurisdiction, is ambulatory at the option of the party injured, and becomes punishable, as such, wherever he may see fit to die. It may be manslaughter, in its various degrees, in one place, murder, in its various degrees, in another. Its punishment may be fine in one country, imprisonment, whipping, beheading, strangling, quartering, hanging, or torture in another, and all for no act done by the defendant in any of these jurisdictions, but only because the party injured found it convenient to travel.

This is not like the case of stolen goods, carried from one state to another, or of leaving the state for any purpose whatever, like that for fighting a duel, or of sending a letter or messenger, or message, for any purpose, into another state; for in all these cases the cognizance is taken for an *act done* within the jurisdiction.

If the acts charged in this indictment be criminal in New Jersey, it must be either by force of some statute or upon general principles. There is no statute, unless it be the act to be found in Nix. Dig. 184, § 3. But this evidently relates to murder only, and not to manslaughter.

But I cannot make myself believe that the legislature, in that act, intended to embrace cases where the injury was inflicted within a foreign jurisdiction, without any act done by the defend-

ant within our own. Such an enactment, upon general principles, would necessarily be void; it would give the courts of this state jurisdiction over all the subjects of all the governments of the earth, with power to try and punish them, if they could by force or fraud get possession of their persons in all cases where personal injuries are followed by death.

An act, to be criminal, must be alleged to be an offence against the sovereignty of the government. This is of the very essence of crime punishable by human law. How can an act done in one jurisdiction, be an offence against the sovereignty of another? All the cases turn upon the question where the act was done. The person who does it may, when he does it, be within or without the jurisdiction, as by shooting or sending a letter across the border; but the act is not the less done within the jurisdiction because the person who does it stands without. This case is not at all like those where the defendant is tried in England for a crime committed in one of the dependencies of the British empire. There the act is done, and the crime is in fact committed against the sovereignty of the British crown, and only the place of trial is changed.

If our government takes jurisdiction of this case, it must be not by virtue of any statute, but because it assumes general power to punish acts *mala in se* wherever perpetrated in the world. The fact of the party injured can give no additional jurisdiction.

Such crimes may be committed on the high seas, in lands where there are, or where there are not regular governments established. When done upon the high seas, they may be either upon our vessels or upon vessels belonging to other governments. When done upon our vessels, in whatever solitary corner of the ocean, from the necessity of the case, and by universal acceptance, the vessel and all it contains is still within our jurisdiction, and when the vessel comes to port the criminal is still tried for *an act done* within our jurisdiction. But we have never treated acts done upon the vessels of other governments as within our jurisdiction, nor has such ever been done by any civilized government.

When an act *malum in se* is done in solitudes, upon land where there has not yet been formally extended any supreme human power, it may be that any regular government may feel, as it were, a divine commission to try and punish. It may, as in cases of crime committed in the solitudes of the ocean, upon and by vessels

belonging to no government, *pro hac vice* arrogate to itself the prerogative of omnipotence, and hang the pirate of the land as well as of the water. Further than this it could not have been intended that our statute should apply. But here the act was done in the State of New York, a regularly organized and acknowledged supreme government. The act was a crime against their sovereignty. That was supreme within its territorial limits and in its very nature, and in fact is exclusive. There cannot be two sovereignties supreme over the same place at the same time over the same subject matter. The existence of theirs is exclusive of ours. We may exercise acts of sovereignty over the wastes of ocean or of land, but we must necessarily stop at the boundary of another. The allegation of an act done in another sovereignty, to be a violation of our own, is simply alleging an impossibility, and all laws to punish such acts are necessarily void.

It is said that if we do not take jurisdiction, the defendant will go unpunished, inasmuch as the party injured not dying in New York, he could not be guilty of murder there. But New York may provide by law for such cases, and if she does not, it is their fault, and not ours. The act done is against their sovereignty, and if she does not choose to avenge it, it is not for us to step in and do it for them.

I think that the Oyer and Terminer should be advised that no crime against this state is charged in the indictment.

Cited in *State v. Wyckoff*, 2 Vr. 68.

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### *Locality of Crime.*

*Stout v. State*, 76 Md. 317. (1892.)

ALVEY, C. J., delivered the opinion of the Court.

This appeal, taken under the Act of 1892, ch. 506, enacted as section 77 of Article 5 of the Code, is from the final judgment of the Court below, sentencing the appellant to death, on a verdict of murder in the first degree.

There are two questions raised. The first is on a demurrer to the indictment, in respect to the jurisdiction of the Court to try the prisoner, because of supposed defect of venue as to the commission of the crime; and the second is presented by bill of ex-

ception, as to the supposed illegal separation of the jury during the progress of the trial.

1. As to the demurrer to the indictment.

The indictment contains four counts. There is no question made upon either the first or second count; but the third and fourth counts are supposed to be obnoxious to the objection taken to them by demurrer. The demurrer was overruled, and the prisoner then pleaded not guilty, upon which he was tried and convicted.

The third count of the indictment charges that the mortal blow was inflicted by the prisoner on the deceased in Cecil County, Maryland, but that death, in consequence of the wound, subsequently ensued in the City of Philadelphia, in the State of Pennsylvania. In the language of the indictment, it is charged that the accused, "on the first day of February, 1891, with force and arms, at Cecil County aforesaid, in and upon one George Dittmar, in, &c., then and there being, feloniously, wilfully, and his malice aforethought, did make an assault, &c., and, with a certain stick, &c., him, the said Dittmar, did then and there strike, giving him, the said Dittmar, then and there, one mortal wound; and of which said mortal wound the said Dittmar, on and from the said first day of February, in the year aforesaid, until and upon the fourth day of March, in the year aforesaid, at the County and City of Philadelphia, in the State of Pennsylvania, then and there did languish, and languishing did live; on which said fourth day of March, in the year aforesaid, at the county and city last aforesaid, he, the said Dittmar, of the mortal wound aforesaid, died."

The fourth count, charging the felonious assault and wounding as in the third, differs from that count in this, that in the fourth count it is charged that the mortal blow was inflicted on the deceased by the accused, "at Cecil County, Maryland, with a club, and that of this mortal wound said Dittmar, on and from the said first of February, in the year aforesaid, to the fourth day of March, in the year aforesaid, languished, and languishing did live, as well at and in the county aforesaid, as at and in the County and City of Philadelphia, in the State of Pennsylvania, then and there did languish, and languishing did live; on which said fourth day of March, in the year aforesaid, at and in the County and City of Philadelphia, aforesaid, to wit, at and in Cecil County aforesaid, the said Dittmar, of the mortal wound aforesaid, died."

The death occurring in Philadelphia as the result of the mortal wound inflicted in Maryland, the question presented on demurrer to the third and fourth counts of the indictment is one in regard to which some doubts, it would appear, were entertained in the early days of the English common law. These doubts seem to have had their foundation in certain maxims and practice that originally obtained in respect to the venue for the trial of facts, the reason for which has long since ceased to exist; it being supposed, in the early periods of the English law, that it was necessary that the jury should come from the vicinage where the matters of fact occurred, and therefore be better qualified to investigate and discover the truth of the transaction than persons living at a distance from the scene could be. Hence the venue was always regarded as a matter of substance; and where, at the common law, the commission of an offence was commenced in one county and consummated in another, the venue could be laid in neither, and the offender went altogether unpunished. And even in the case of murder, if the mortal wound was inflicted or poison administered, in one county, and the party died in consequence of the wound or poison in another, it was doubted by some whether the murderer could be punished in either county; for it was supposed that a jury of the first could not take cognizance of the death in the second, and a jury of the second could not inquire of the wounding or poisoning in the first; and so the felon would escape punishment altogether. 1 Chit. Cr. Law, 177. This doubt was founded in a mere technicality, and savored so much of a senseless nicety, that it was deemed a reproach to the law; and to remove all doubt, and to fix a certain venue for the trial of the crime, the Statute of 2 and 3 Edward VI was passed; and after reciting in a long preamble the great failures of justice which arose from such extreme nicety, that Statute enacted that in cases of striking or poisoning in one county, and death ensuing in another, the offender could be indicted, tried and punished in the district or county where the death happened, as if the whole crime had been perpetrated within the boundary of such district or county. And by the subsequent Statute of 2 Geo. II, ch. 21, it was enacted that, where any person feloniously stricken or poisoned, at any place out of England, shall die of the same in England, or being feloniously stricken or poisoned in England, shall die of such stroke or poisoning out of England, an indictment thereof, found by the



jurors of the county in which either the death or the cause of death, shall respectively happen, shall be as good and effectual in law, as well against principals as accessories, as if the offence had been committed in the county where such indictment may be found.

The principles or provisions of these two English statutes are not exactly consistent, the one with the other, but the Statute of 2 and 3 Edward VI, ch. 24, is not now applicable or in force in this State, whatever may have been the case prior to our own Act of 1809, ch. 138, sec. 17; and the Statute of 2 George II, ch. 21, was never applicable here, as found by Chancellor KILTY, in his Report on the English Statutes, published in 1811.

By section 278 of Art. 27 of the Code, codified from section 17 of the Act of 1809, ch. 138, it is provided that "if any person be feloniously stricken or poisoned in one county, and die of the same stroke or poison in another county, within one year thereafter, the offender shall be tried in the Court within whose jurisdiction such county lies where the stroke or poison was given; and in like manner, an accessory to murder or felony committed, shall be tried by the Court within whose jurisdiction such person became accessory." This statute, as will be observed, conforms neither to the Statute 2 & 3 Edward VI, nor to that of 2 George II; but it is, as we think is manifest, simply in confirmation or declaratory of the common law. This, we think, is made clear upon examination of text writers of high authority, and by judicial decisions of Courts entitled to great weight in the determination of such a question. And if this provision of our Code be simply declaratory of the common law, as we suppose it to be, the same reason and principle equally apply to the case where the mortal blow or poison is given in any county in this State, and the party so stricken or poisoned shall, in consequence of the blow or poison, die out of the State, within the year and a day after the blow given or poison administered, as to the case provided for by the terms of the statute. In such case it is the law of Maryland that is violated, and not the law of the State where death may happen to occur. By the felonious act of the accused, not only is there a great personal wrong inflicted upon the party assaulted or mortally wounded, while under the protection of the law of the State, but the peace and dignity of the State where the act is perpetrated is outraged; and though death may not immediately follow, yet if it does follow as a consequence of the felonious act within the year,

the crime of murder is complete. In inflicting the mortal wound then and there, the accused expends his active agency in producing the crime, no matter where the injured party may languish, or where he may die, if death ensues within the time, and as a consequence of the stroke or poison given. The grade and characteristics of the crime are determined immediately that death ensues, and that result relates back to the original felonious wounding or poisoning. The giving the blow that caused the death constitutes the crime.

LORD COKE seems to have been responsible, to a considerable extent, for the maintenance of the doubt that was formerly entertained upon this subject. In 3 Inst., at page 48, founding his text on the preamble to the Statute of 2 & 3 Edward VI, he says: "And before the making of the Statute 2 Edward VI, if a man had been feloniously stricken or poisoned in one county, and after had died in another county, no sufficient indictment could thereof have been taken in either of said counties, because, by the law of the realm, the jurors of one county could not inquire of that which was done in another county. It is provided in that Act that the indictment may be taken in that county where the death doth happen." The reason assigned for this passage from the Institutes can hardly be accepted as sound at this day—that is, that the jurors of one county cannot inquire of that which is done in another county.

But we have the authority of the great Sir MATTHEW HALE to the contrary of this doctrine of COKE. In 1 Hale P. Cr., 426, the author says: "At common law, if a man had been stricken in one county and died in another, *it was doubtful* whether he were indictable or triable in either, *but the common opinion was*, that he might be indicted where the stroke was given, for the death is *but a consequent, and might be found in another county;*" and he cites for this the Year Books, 9 Edw. IV, p. 48, and 7 Hen. VII, p. 8. And he then proceeds to say, that "if the party died in another county, the body was removed into the county where the stroke was given, for the coroner to take an inquest *super visum corporis.*" But now, says the author, "by the Statute of 2 & 3 Edw. VI, ch. 24, the justices or coroner of the county where the party died shall inquire and proceed, as if the stroke had been in the same county where the party died." Thus showing that the common law was changed by the Statute of 2 and 3 Edw. VI; but that our statute of 1809, ch. 138, sec. 17, is simply declaratory

of the common law, and, according to that law, and to what was plainly Sir MATTHEW HALE's conclusion from the history of the law, the crime in this case was committed where the fatal stroke was given, and that the place of the consequent death was quite immaterial.

The authority of the opinion of Lord HALE, so plainly indicated in the passage from his work just quoted, has been fully recognized by subsequent writers of high repute. Thus, in 2 Hawkins P. Cr., p. 120, sec. 13, the author says: "It is said by some that the death of one who died in one county of the wound given in another, was not indictable at all at common law, because the offence was not complete in either county, and the jury could enquire only of what happened in their own county. *But it hath been holden by others*, that if the corpse were carried into the county where the stroke was given, the whole might be inquired of by a jury of the same county." And so in 1 East Cr. Law, page 361, that very learned and accurate writer says: "Where the stroke and death are in different counties, it was doubtful at common law whether the offender could be tried at all, the offence not being complete in either, *though the more common opinion was that he might be indicted where the stroke was given*, for that alone is the act of the party, and the death is but a consequence, and might be found, though in another county, and the body was removed into the county where the stroke was given."

It is not necessary that we should cite other text writers upon this subject; those that we have cited sufficiently indicating the state of the English common law in regard to the question here involved, though expressed with the doubts formerly entertained by some.

The question, however, does not rest on the authority of text writers alone; judicial decisions are not wanting upon the subject.

In the case of *Rex v. Hargrave*, 5 Carr. & P., 170, tried before Mr. Justice PATTESON in 1831, an indictment for manslaughter charged that A. gave the deceased divers mortal blows at P., in the County of M., and that the deceased languished and died at D., in the county of K.; and that the prisoner was *then and there* aiding in the commission of the felony. Upon objection to the sufficiency of the indictment, the learned Justice, in overruling the objection, said: "*The giving of the blows which caused the*

*death constituted the felony.* The languishing alone, which is not any part of the offence, is laid in Kent; the indictment states that the prisoner was then and there present, aiding and abetting in the commission of the felony; that must, of course, apply to the Parish of All Saints, where the blows, which constitute the felony, were given." And there are many cases in this country which hold that, upon the definition of murder, and the elements that enter into and constitute the crime, the place of the death is wholly immaterial, in the prosecution of the offender, except in those cases specially provided for by positive statute. In other words, that the giving of the mortal blow *that caused* the death constitutes the felony; and the removal of the corpse to the county in which the mortal stroke was inflicted is not required for any purpose connected with the jurisdiction of the Court over the crime or the offender. And without stating the facts of each case, wherein these principles have been considered and maintained, we may refer to the cases of *Riley v. State*, 9 Hump., 646; *People v. Gill*, 6 Cal., 637; *State of Minnesota v. Gessert*, 21 Minn., 639; *State v. Bowen*, 16 Kans., 476; *Green v. State*, 66 Ala., 40.

In the very celebrated case of the *United States v. Giteau*, tried in the District of Columbia in 1881-2, and reported in 1 Mackey, 498, this question of jurisdiction was extensively discussed by counsel and elaborately considered by the Court. The accused was indicted under section 5339 of the Revised Statutes of the United States, for the murder, by shooting, in the District of Columbia, of the then President of the United States, James A. Garfield, who, after receiving the mortal wound, languished for more than two months, and died in the State of New Jersey, where he had been taken in the hope of relief. The contention there was, on the part of the prisoner, that the murder was committed only partly within the District of Columbia, and partly within the State of New Jersey, and therefore there was no jurisdiction in the Court in the District of Columbia to try and convict the prisoner for his crime. But this contention was overruled. It was first considered and overruled in the Criminal Court, in a very learned and able opinion by Mr. Justice Cox, before whom the case was tried, and after conviction the case was taken to a session in General Term of the Supreme Court of the District, where the decision of the trial Court was fully reviewed, and the conclusion of Mr. Justice Cox concurred in, though for reasons somewhat variant

from those employed by the trial Judge. In the opinion of Judge Cox, the common law authorities sustained the jurisdiction, but he was further of opinion that the Statute of 2 Geo. II, ch. 21, was in force in Maryland at the date of the cession of the District by this State, and consequently was still in force in the District, and that that Statute fully applied to the case. And while the Court of review, sitting in General Term, agreed in the conclusion arrived at by Judge Cox, and also in the proposition that the common law was sufficient for the case, it held that, by the terms of the statute of the United States, applicable to the District of Columbia, which provides that in all places or districts, under the sole and exclusive jurisdiction of the United States, if a party shall *commit the crime of murder*, such person, on being convicted, shall suffer death, the party inflicting the mortal wound in the District is guilty of murder, though the death of the victim subsequently occurs, in consequence of the wound, in any of the States of the Union; that, in such case, the crime of murder becomes complete in the District where the mortal wound was given, in the contemplation of the statute, irrespective of the place of the death. Thus holding that the mortal stroke which caused the death constituted the felony, and that the place of death was immaterial to the jurisdiction of the Court to try and convict the offender.

But that was not all that occurred. After the conviction and review had at the General Term, an application was made to the late Mr. Justice BRADLEY, of the Supreme Court of the United States, for a *habeas corpus*, on the ground that the Criminal Court of the District of Columbia had no jurisdiction of the offence, and therefore the conviction was void. But that learned Justice, upon consideration of the case, concurred with the Courts of the District of Columbia, in holding that there was jurisdiction of the offence, and that the party had been properly tried, and therefore dismissed the petition. And thus ended that memorable case.

Both upon reason and authority, therefore, this Court is of opinion that the Court below was entirely correct in overruling the demurrer to each and all of the counts of the indictment; and as there is no cause assigned in support of the motion in arrest of judgment, that could be considered on such motion, the Court was also correct in overruling that motion.

2. The second question presented is one of practice. It arose upon a motion by the prisoner to discharge the jury, during the

course of the trial, because of alleged separation of the jury in the recess of the Court. It appears that the entire panel of twelve were placed in charge of the sheriff, during a recess of the Court from 4.30 P. M. to 7.30 P. M., and were taken to quarters provided at a hotel in the town. Upon reaching the hotel, one of the jurors was suffering so much from illness, that he had to be allowed to go to bed, but he was alone, and was locked in the room by the sheriff. At the hour of reassembling of the Court, the other eleven jurors were taken into Court, but in consequence of the inability of the sick juror to be present, the Court adjourned until 10 o'clock A. M. the next day, at which time the whole panel attended. It is not pretended or suggested that the sick juror was approached by any one, or tampered with in any manner. The motion to discharge the panel was founded upon the simple fact that the sick juror had been separated from his fellow jurors before verdict rendered.

In overruling this motion, the Court below certainly committed no error. In the trial of capital cases, even, there are many occasions when in reason, and a proper regard to the needs of humanity, it may become necessary to allow a temporary separation of the jury, without necessarily breaking up the trial, and that even after the jury have retired to consider of their verdict, otherwise protracted trials could seldom be brought to a final conclusion. Of course, the separation should only be allowed when attended with those precautions and safeguards necessary to secure entire freedom from approach or external influence of any kind. *Neal v. State*, 64 Ga., 272; *State v. Payton*, 90 Mo., 220; *Coleman v. State*, 59 Miss., 484; *State v. O'Brien*, 7 R. I., 337; *Goerson v. Comm.*, 106 Penn. St., 477; *People v. Bonney*, 19 Cal., 426; 1 Bish. Crim. Pro., secs. 993-4; 12 Am. & Eng. Enc. of Law, 371. But each case rests upon its own peculiar circumstances, and is within the sound discretion of the trial court; and is therefore not the subject of appellate review, except where it is affirmatively shown that the party has been prejudiced by the action of the Court.

It follows that the judgment below must be affirmed.

*Judgment affirmed.*

(Decided 17th November, 1892.)

*State v. Hall, 114 N. C. 909. (1894.)*

Indictment for murder, tried at Spring Term, 1893, of CHEROKEE Superior Court, before GRAVES, J., and a jury.

The defendants (Hall as principal and Dockery as accessory before the fact) were charged with the killing of Andrew Bryson on the 11th July, 1892, in Cherokee county. The testimony tended to show that when the shooting occurred, by which deceased was killed, the defendants were in North Carolina and the deceased in Tennessee.

The defendants asked for the following instructions (among others:

"1. That it devolves upon the State to satisfy the jury beyond a reasonable doubt that the killing took place in the State of North Carolina; and if the State has failed to satisfy the jury beyond a reasonable doubt that the deceased received the wound from which he died whilst he was in the State of North Carolina, the defendants are not guilty.

"2. That if the prisoners were in North Carolina and the deceased was in Tennessee, and the prisoners, or either of them, shot the deceased whilst he, the deceased, was in the State of Tennessee, and the deceased died from the effects of the wounds so received, the defendants are not guilty."

The instructions were refused, and after a verdict of guilty the defendants appealed from the judgment rendered thereon.

SHEPHERD, C. J.:

There was testimony tending to show that the deceased was wounded and died in the State of Tennessee, and that the fatal wounds were inflicted by the prisoners by shooting at the deceased while they were standing within the boundaries of the State of North Carolina. The prisoners have been convicted of murder, and the question presented is whether they committed that offence within the jurisdiction of this State.

It is a general principle of universal acception that one State or sovereignty cannot enforce the penal or criminal laws of another, or punish crimes or offences committed in and against

another State or sovereignty. Rorer's Interstate Law, 308; Story's Conflict Laws, 620-623; The Antelope, 10 Wheaton, 66-123; *State v. Knight*, Taylor's Rep., 65; *State v. Brown*, 1 Haywood, 100; *State v. Cutshall*, 110 N. C. 538.

There may, by reason of "a statute or the nature of a particular case," be apparent exceptions to the rule, as if "one personally out of the country puts in motion a force which takes effect in it, he is answerable where the evil is done, though his presence was elsewhere. So where a man, standing beyond the outer line of a territory, by discharging a ball over the line kills another within it; or himself, being abroad, circulates libel here, or in like manner obtains here goods by false pretenses; or does any other crime in our own locality against our laws, he is punishable, though absent, the same as if he were present." 1 Bishop Cr. Law, 109-110; *State v. Cutshall*, *supra*.

These cases, however, are but instances of crimes which are considered by the law to have been committed within our territory, and in nowise conflict with the general principle to which we have referred. Starting, then, with this fundamental principle and avoiding a general discussion of the subject of extra-territorial crime, we will at once proceed to an examination of the interesting question which has been submitted for our determination.

It seems to have been a matter of doubt in ancient times whether, if a blow were struck in one county and death ensued in another, the offender could be prosecuted in either, though according to Lord Hale (Pleas of the Crown, 426) "the more common opinion was that he might be indicted where the stroke was given." This difficulty, as stated by Mr. Starkie, was sought to be avoided by the legal device "of carrying the dead body back into the county where the blow was struck, and the jury might there," he adds, "inquire both of the stroke and death." 1 Starkie Cr. Pl., 2 Ed., 304; 1 Hawks, Pl. of Crown, ch. 13; 1 East, 361. But to remove all doubt in respect to a matter of such grave importance, it was enacted by the statute 2 and 3 Edward VI. that the murderer might be tried in the county where the death occurred. This statute, either as a part of the common law or by re-enactment, is in force in many of the States of the Union, and as applicable to counties within the same State its validity has never been questioned (see Acts 1891, ch. 68, and also The Code of Tennessee,



§ 5801), but where its provisions have been extended so as to affect the jurisdiction of the different States its constitutionality has been vigorously assailed. Such legislation, however, has been very generally, if not indeed uniformly, sustained. *Simpson v. State*, 4 Hump. (Tenn.), 461; *Green v. State*, 66 Ala., 40; *Commonwealth v. Macloon*, 101 Mass., 1; *Tyler v. People*, 8 Mich., 326; *Hemmaker v. State*, 12 Mo., 453; *People v. Burke*, 11 Wend., 129; *Hunter v. State*, 40 N. J., 495.

Statutes of this character "are founded upon the general power of the Legislature, except so far as restrained by the Constitution of the Commonwealth and the United States, to declare any willful or negligent act, which causes an injury to person or property within its territory, to be a crime." Kerr on Homicide, 47. See, also, remarks of Justice BRADLEY in the *habeas corpus* proceedings of Guiteau, reported in the notes to the case of *United States v. Guiteau*, 47 Am. Rep., 247; 1 Mackey, 498. In many of the States there are also statutes substantially providing that where the death occurs outside of one State, by reason of a stroke given in another, the latter State may have jurisdiction. See our act, The Code, § 1197. The validity of these statutes seems to be undisputed, and, indeed, it has been held in many jurisdictions that such legislation is but in affirmance of the common law. This view is taken by the Supreme Court of the District of Columbia in Guiteau's case, *supra*, in which the authorities are collected and their principle stated with much force by Justice JAMES. It is manifest that statutes of this nature are only applicable to cases where the stroke and the death occur in different jurisdictions, and it is equally clear that where the stroke and the death occur in the same State the offence of murder at common law is there complete, and the Courts of that State can alone try the offender for that specific common law crime.

The turning point, therefore, in this case is whether the stroke was, in legal contemplation, given in Tennessee, the alleged place of death; and upon this question the authorities all seem to point in one direction.

In the early case of *Rex v. Coombs*, 1 Leach Crown Cases, 388, it was held that "if a loaded pistol be fired from the land at a distance of one hundred yards from the sea, and a man is maliciously killed in the water one hundred yards from the shore, the offender shall be tried by the Admiralty Jurisdiction; for the

offence is committed where the death happened and not at the place whence the cause of the death proceeds." See also, 1 East, 367, and 1 Chitty Cr. Law, 154.

In the case of *United States v. Davis*, 2 Sumner, 482, a gun was fired from an American ship lying in the harbor of Raiatea, one of the Society Isles and a foreign government, by which a person on board a schooner, belonging to the natives and lying in the same harbor, was killed—Mr. Justice STORY, in the course of his opinion, said: "What we found ourselves upon in this case is that the offence, if any, was committed on board of a foreign schooner belonging to inhabitants of the Society Islands, and of course under the territorial government of the Society Islands, with which kingdom we have trade and friendly intercourse, and which our Government may be presumed (since we have a Consul there) to recognize as entitled to the rights and sovereignty of an independent nation, and of course entitled to try offences committed within its territorial jurisdiction. I say the offence was committed on board of the schooner; for, although the gun was fired from the ship *Rose*, the shot took effect and the death happened on board of the schooner, and the act was, in contemplation of law, done where the shot took effect. \* \* \* We lay no stress on the fact that the deceased was a foreigner. Our judgment would be the same if he had been an American citizen."

In *Simpson v. State*, 17 S. E. Rep., 984, it was held by the Supreme Court of Georgia that one who, in the State of South Carolina, aims and fires a pistol at another who at the time is in the State of Georgia, is guilty of the offence of "shooting at another" although the ball did not take effect, but struck the water in the latter State. The Court said: "Of course the presence of the accused within this State is essential to make his act one which is done in this State, but the presence need not be actual; it may be constructive. The well-established theory of the law is that where one puts in force an agency for the commission of crime, he in legal contemplation accompanies the same to the point where it becomes effectual. \* \* \* So, if a man in the State of South Carolina criminally fires a ball into the State of Georgia the law regards him as accompanying the ball and as being represented by it up to the point where it strikes. If an unlawful shooting occurred while both the parties were in this State the mere fact of missing would not render the person who

shot any the less guilty; consequently, if one shooting from another State goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle."

The Court approved of the language of CAMPBELL, J., in *Tyler v. People*, 8 Mich., 320, that "a wounding must of course be done where there is a person wounded, and the criminal act is the force against his person. That is the immediate act of the assailant, whether he strikes with a sword or shoots with a gun, and he may very reasonably be held present where his forcible act becomes directly operative."

In speaking of crime committed by one out of the State, through an innocent agent, Judge RORER says: "In such case the innocent person in the State is the means used to perpetrate the crime therein, just as if a person who shoots out of a State across the line into another State and therein intentionally kills another person is in such case guilty of committing the criminal act within the State without himself being at the time therein." *Interstate Law*, 326.

In *Commonwealth v. Macloon*, *supra*, Justice GRAY says that if one's "unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result, is not essential. He may be held guilty of homicide by shooting, even if he stands afar off, out of sight, or in another jurisdiction."

In *State v. Carter*, 3 Dutcher, 499, the Supreme Court of New Jersey, in discussing a kindred question, said: "This is not the case where a man stands on the New York side of the line, and shooting across the border kills one in New Jersey. When that is so the blow is in fact struck in New Jersey. It is the defendant's act in this State. The passage of the ball, after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile passes over a boundary in the act of striking is a matter of no consequence. The act is where it strikes, as much where the party who strikes stands out of the State as where he stands in it."

In *State v. Chapin*, 17 Ark., 560, the Court said: "For ex-

ample, if a man standing beyond our boundary line, in Texas, were, by firing a gun or propelling any other implement of death, to kill a person in Arkansas, he would be guilty of murder here, and answerable to our laws, because the crime is regarded as being committed where the shot or other implement propelled takes effect." See also, *People v. Adams*, 3 Denio, 207.

In *Stillman v. Manufacturing Co.*, 3 Woodb. & M. (U. S.), 538, WOODBURY, J., said: "I can conceive of crimes, likewise, like civil injuries, which may be prosecuted in two States, though sometimes in different forms as here. \* \* \* So, if one fires a gun in one State, which kills an individual in another State, there may be the offence of using a deadly weapon in the first State (that is, we suppose, by statute) and committing murder by killing in the second State."

In speaking of the validity of acts similar to that of Edward VI., *supra*, Mr. Black, in an article in the Central Law Journal (Vol. XXXVIII, p. 318), remarks: "There is less difficulty in cases where the means of death employed, though set in motion in one jurisdiction, reach and operate upon their object in another territory. For, of course, the act can amount to nothing more than an attempt, until the fatal agency comes in contact with the body of the victim." See, also, upon this subject American Law Review, Vol. XX, p. 918.

In view of the foregoing authorities it cannot be doubted that the place of the assault or stroke in the present case was in Tennessee, and it is also clear that the offence of murder at common law was committed within the jurisdiction of that State. If this be so it must follow that unless we have some statute expressly conferring jurisdiction upon the Courts of this State, or making the act of shooting under the circumstances a substantive murder, the offence with which the prisoners are charged can only be tried by the tribunals of Tennessee.

It is true that in Wharton's Criminal Law, 288, it is said in a general way that "a concurrent jurisdiction exists in the place of starting the offence," but by a reference to the cases cited in support of the proposition it will be readily seen that they have no application to the question under consideration. These and like authorities are where libels are *uttered* in one State to take effect in another (*U. S. v. Warrall*, 2 Dall., 383), or where, either by common law or by statute, the place of the stroke has concurrent

jurisdiction (*Green v. State, supra*), or where an accessory before the fact in one State to a felony committed in another was held to be indictable in the State where he became accessory (*State v. Chapin, supra*), or in certain cases of false pretenses, or in conspiracies where an overt act is committed at the place of the trial, or where by statute a particular "section" of an offence committed in one jurisdiction is there made indictable; as, for instance, the act of shooting or unlawfully using a deadly weapon within the State, as in the present case. In some instances there may be concurrent jurisdiction of the whole offence, and in others there may exist the jurisdiction of an attempt in one State and of the consummated offence in another. In a note to the preceding section the author thus explains: "The place of such residence (that is, where the offence is started) has jurisdiction over the attempt or conspiracy as the case may be. The place of the consummation has jurisdiction of the offence consummated on its soil." In respect to this very matter the learned author has made his meaning entirely clear in his article on the conflict of laws. 1 Criminal Law Magazine, 695. In putting the case of A in New York shooting B in Connecticut, he says that the place of the consummation of the crime should be regarded as its locality. "Until such consummation a crime, so far as jurisdiction is concerned, is simply an attempt and only punishable as such. It may be indictable for A merely to discharge a gun. It may be said, 'This is a dangerous act, punishable as such'; or it may be said, 'From all the circumstances of the case we infer that you are attempting B's life, and you are to be indicted for this attempt.' But it is not until we see before us a man wounded by such a shot that the crime in its completeness exhibits itself."

There being, then, no concurrent jurisdiction at common law, we will now consider whether it has been conferred by statute; for it is well settled that "whenever a homicide is committed partly in and partly out of the jurisdiction where the charge is made, the power to punish it depends upon the question whether so much of the act as operates in the county or State in which the offender is indicted and tried has been declared to be punishable by the law of that jurisdiction." Kerr on Homicide, 226; *Commonwealth v. Macloon, supra*. It is not very seriously insisted on the part of the State that our statute (The Code, § 1197) applies to this case,

but inasmuch as it was referred to on the argument it is proper that we should briefly examine into its provisions. It provides:

"In all cases of felonious homicide, when the assault shall have been made within this State and the person assaulted shall die without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all intents and purposes as if the person assaulted had died within the limits of this State."

This statute has received a judicial construction by this Court in *State v. Dunkley*, 3 Ired., 116, and it was held that it did not create any new offence, but merely removed a difficulty which existed as to the place of the trial. In view of the authorities cited it can hardly be contended that the assault in the present case was committed in this State, and especially is this so when the assault mentioned in the statute evidently means not a mere attempt, but such an injury inflicted in this State which results in death in another State. This would seem manifest from the history of the legislation as well as the language of the act, which plainly contemplates that every part of the offence, except the death, must have occurred in this State. It was a subject of doubt, as we have seen, whether the accused could be tried in the place of the stroke, the death having occurred without the jurisdiction, and it was to remove this doubt alone that this and similar legislation was resorted to. It was, of course, never questioned that the place where both the stroke and the death occurred was the place where the crime was committed. We are relieved, however, from all doubt, if any existed, upon this point by the opinion of Chief Justice RUFFIN in *Dunkley's case*, *supra*. He says that the act "does not profess to define 'felonious homicide,' or to constitute the crime by any particular acts, but merely says that, in certain cases of felonious homicide, the offender may be indicted and of course tried and punished in the county where the *stroke* was given—meaning, though it does not (like the statute 2 and 3 Edward VI.) expressly say so, 'in the same manner as if the death had happened in the same county *where the stroke was given.*'" As it is plain that in contemplation of law the stroke was given in Tennessee, we are of the opinion that there was error in refusing to give the instructions prayed for by the prisoners.

The fact that the prisoners and the deceased were citizens of the State of North Carolina cannot affect the conclusion we have

reached. If, as we have seen, the offence was committed in Tennessee, the personal jurisdiction generally claimed by nations over their subjects who have committed offences abroad or on the high seas cannot be asserted by this State. Such jurisdiction does not exist as between the States of the Union under their peculiar relation to each other (Rorer's Interstate Law, 308), and even if it could be rightfully claimed it could not in a case like the present be enforced in the absence of a statute providing that the offence should be tried in North Carolina. Even in England, where it seems the broadest claim to such jurisdiction is asserted, a statute (33 Hen. VIII.) appears to have been necessary in order that the Courts of that country could try a murder committed in Lisbon by one British subject upon another. *Rex v. Sawyer*, Russell & Ryan Cr. Cases, 294, cited and commented upon in Dunkley's case, *supra*. In *People v. Merrill*, 2 Parker's Cr. Cases, 600, it is said that by the common law offences were local and the jurisdiction in such cases depends upon statutory provisions. See also, Wheaton International Law, 115; 1 Wharton Cr. L., 271; 1 Bishop Cr. Law, 121. Granting, however, that in some instances the jurisdiction may exist without statute, it is not exercised in all cases. Dr. Wharton says: "It has already been stated that as to crimes committed by subjects in foreign civilized States, with the single exception in England of homicides, the Anglo-American practice is to take cognizance only of offences directed against the sovereignty of the prosecuting State; perjury before Consuls and forgery of Government documents being included in this head." To the same effect is 3 Am. and Eng. Enc., 539, in which it is said: "As to offences committed in foreign civilized lands the country of arrest has jurisdiction only of offences distinctively against its sovereignty." See, also, Dr. Wharton's article upon the subject in 1 Criminal Law Magazine, 715. As between the States the question is so clear to us that we forbear a general discussion of the subject. We may further remark that, while it is true that the criminal laws of a State can have no extra-territorial force, we are of the opinion that it is competent for the Legislature to determine what acts within the limits of the State shall be deemed criminal, and to provide for their punishment. Certainly, there could be no complaint where all the parties concerned in the homicide are citizens of North Carolina. It may also be observed that

in addition to its common law jurisdiction the State of Tennessee has provided by statute for the trial of an offender under the circumstances of this case.

For the reasons given we are constrained to say that the prisoners are entitled to a  
New Trial.

FINIS.



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